SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 455

CLAYTON H. STIEF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.

and

DIAMOND ALKALI COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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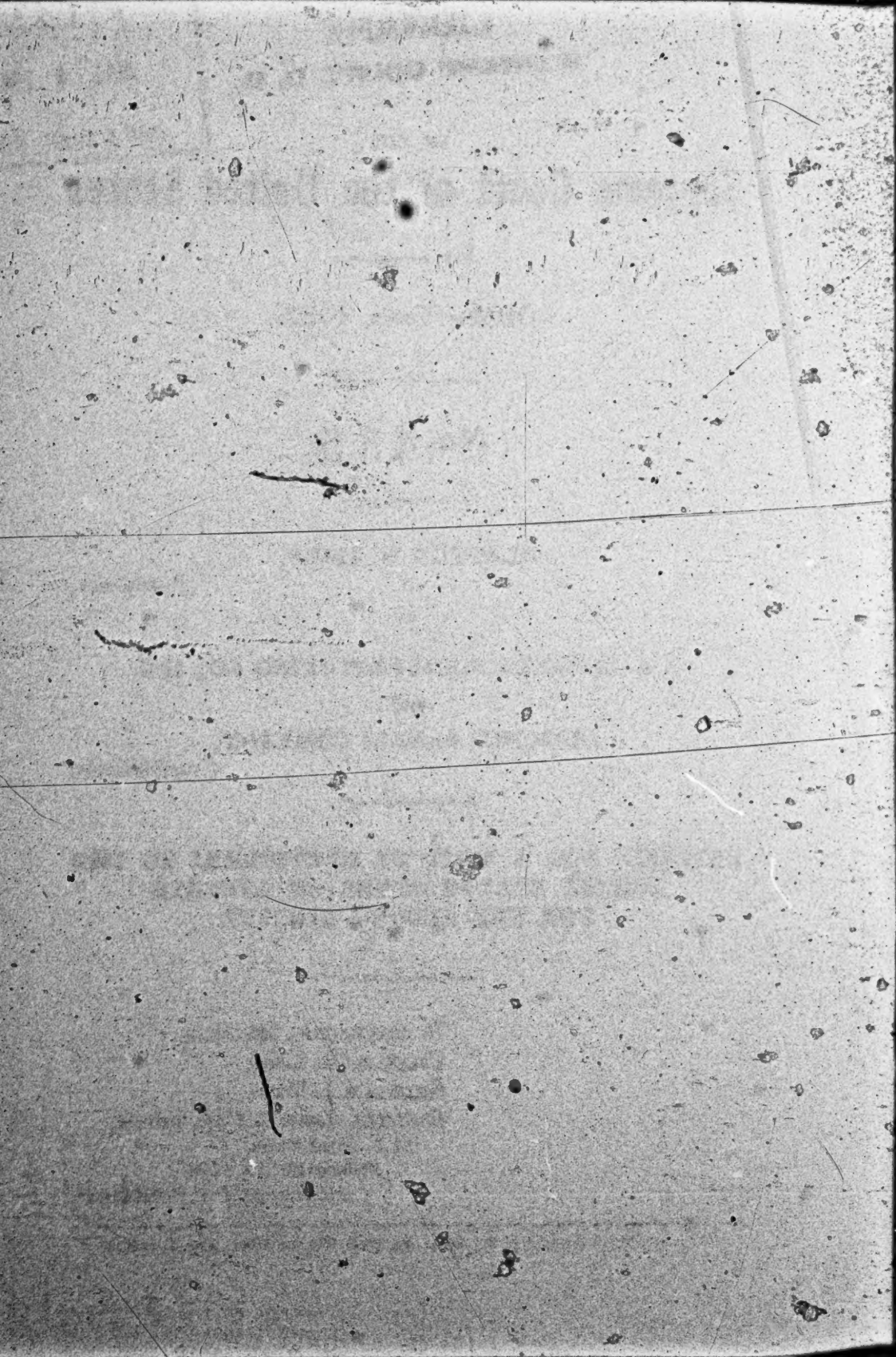

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

CLAYTON H. STIEF, by his Attorneys, RICHTER, LORD & CAVANAUGH, respectfully petitions that a Writ of Certiorari issue to review the judgment which was entered by the United States Court of Appeals for the Second Circuit on May 10, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals of 7th day of April, 1967 is not reported. — F. 2d —. On the basis of that opinion, the United States Court of Appeals for the

Second Circuit entered judgment affirming the judgment of the United States District Court for the Southern District of New York, which had entered a judgment for the defendant.

The opinion of the said Court of Appeals denying plaintiff's timely petition for Rehearing was filed May 10, 1967, and is not reported — F. 2d —. Circuit Judge Friendly dissented from the denial of said petition.

JURISDICTION.

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 7, 1967. Plaintiff's Petition for Rehearing in said Court was timely filed. Defendant filed no answer or brief in opposition thereto. Said Petition was denied by order entered May 10, 1967. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Did not the District Court and the Court of Appeals deprive the petitioner of his right to a trial by jury guaranteed by the Seventh Amendment of the United States Constitution when it held that there should be a directed verdict for the defendants "because the cause of the accident was completely unknown", when petitioner's well qualified expert testified that the cause of the accident was known and that the accident was caused by defendants' highly dangerous product with extremely dangerous propensities about which the petitioner had not warned and by which this young petitioner was totally blinded for life?

2. Did not the District Court and the Court of Appeals violate the dictate of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938) when they refused to recognize the law of Pennsylvania as controlling—more specifically the cases of *Maize v. The Atlantic Refining Com-*

pany, 352 Pa. 51, 41 A. 2d 850 (1945) and *Antonelli v. Tumolo,* 390 Pa. 68, 132 A. 2d 285 (1957) and *Pope v. Reading Company,* 304 Pa. 326, 156 Atl. 106 (1931), and to the contrary applied what they believed the "general law to be".

3. Is not the rule of *Lavender v. Kurn,* 327 U. S. 645 (1946), and FELA case as adopted by Pennsylvania in *Antonelli v. Tumolo, supra* as its basic test of submissibility as to causation binding on all Federal Courts or at least in diversity actions controlled by Pennsylvania law because the accident and all contacts occurred and exist there, or must a plaintiff eliminate every other possibility that arises from the evidence except those supporting him?

4. Does not this case present squarely the need for decision now of the judge-jury issue as to causation and burden of proof where inextricably involved therein is the federally protected constitutional right to trial by jury specifically reserved by this court in *Byrd v. Blue Ridge Rural Elec. Corp.,* 356 U. S. 525, 539, footnotes 10, 11.

STATEMENT OF THE CASE.

This is a stark, tragic, heart-rendering accident in which the petitioner, 34 years of age, married, father of three, was totally and irrevocably blinded when a caustic soda known as "Mule Kick" supplied to him in the course of his work as a plumber by his employer exploded and spattered across the room into his eyes. This accident occurred in Lancaster, Pennsylvania where the petitioner resides and is a citizen. The manufacturer of this caustic soda or lye, known in chemistry as sodium hydroxide was the Diamond Alkali Corporation. It sold and delivered this caustic powder to J. A. Sexauer Co., Inc. in large metal drums on which there were labels warning that this product does "spatter". Sexauer then without changing or adding to the product repackaged the same in small cans and sold it through wholesalers and public supply houses throughout the country. Sexauer did no "manufacturing". Sexauer did not make or alter this product in any way. The label Sexauer put on its cans did *not* warn that this product could or would "spatter" and in fact said it would not.

The only place where petitioner, a citizen of Pennsylvania, could get service on both defendants at one and the same time and place was New York. Petitioner was therefore obliged to come to the United States District Court for the Southern District of New York to institute his action, but the action remained basically a Pennsylvania case and all his contacts and all the rights and privileges that accrued to him were governed exclusively by Pennsylvania law. Thus the United States District Court Judge and all courts above were being asked to decide a question of Pennsylvania law. It was therefore the duty of the courts to ascertain Pennsylvania law and to apply it faithfully to this case being tried of necessity in the jurisdiction of the New York Federal Courts. This was not done. The general law was applied.

In trial by jury below, the court directed a verdict in favor of defendant Diamond at the close of plaintiff's evidence (898a). The jury disagreed as to the liability of

defendant Sexauer, and thereafter the trial court entered judgment in favor of both defendants (17a, 18a). The appeal followed. The Court of Appeals affirmed in a two-to-one decision.

The essential facts are these.

On January 25, 1961 plaintiff's employer ordered plaintiff and a fellow-employee, Robert Nixdorf, to the premises at 5 Locust Street in Lancaster, Pennsylvania, to repair a clogged drain in a kitchen sink located in the second floor apartment (207a). Plaintiff and Nixdorf attempted to open the stopped sink by using a rubber plunger. They were unsuccessful (209a-210a).

They then decided to use "Mule Kick". By the admission of defendant Sexauer's own expert, it is a substance which is listed in a basic text entitled, "Handbook of Dangerous Materials" (1918a). As indicated, this was in fact sodium hydroxide. When mixed with water it became a solution of sodium hydroxide.

Defendant Diamond, the manufacturer of this material, shipped it in 400-pound drums[1] on behalf of Sexauer to

1. The drums were labeled:
"WARNING: CONTAINS CAUSTIC SODA. Burns skin and eyes. Avoid contact with body or clothing. Do not take internally. When handling wear goggles or face-shield and avoid all skin contact. *While making solutions, add Caustic Soda slowly to surface to avoid violent spattering.* (Emphasis supplied.) In case of accidental skin contact, flush affected parts with water and wash with vinegar. For eyes, flush freely with water for at least 15 minutes. Obtain medical attention. (700a)." This evidence clearly indicated how dangerous Diamond believed its own product to be. It was evidence of actual notice to Sexauer. It was evidence of Diamond's own appreciation of the danger. But despite the manifest relevance of that evidence as against both defendants, the learned trial judge erroneously excluded that label and its proof from the case and withheld it from the jury (700a). Despite this warning given by Diamond on its own drum label that this product will "violently spatter", Sexauer put on its labels a denial of vital information and said that "Mule Kick" is pure, powerful, safe, and contains no disguised perfumes, no dangerous bubbling adulterants causing injurious spray, explosive gases, harmful fumes." This was a clear assurance that nothing in Mule Kick could cause a violent spattering.

a place in New Jersey where it was packaged in 12-ounce cylindrical cans on each of which at Sexauer's direction there were placed distinctively designed labels entitled "Mule Kick". Diamond's label on its drums makes clear there is no question that this caustic soda when put into solution would "violent[ly] spatter". This established not only that Diamond had actual notice that this product would explode and spray violently but that Sexauer, too, was placed on full clear explicit warning of this characteristic of this caustic soda which Sexauer thereafter had packaged for it and labeled as "Mule Kick". Since the essence of plaintiff's case of Sexauer's liability is directed toward that label's inadequacies, untruths, misstatements and misinformation, the "Mule Kick" label is set forth in its entirety".

"

'MULE KICK'

Trade Mark Registered

Clears Clogged Drains—Peps up lazy drains.
Advertised in The Saturday Evening Post and a household favorite for a generation.
12 oz. net.
No odor—No fumes.
Waste Pipe Cleaner.

DIRECTIONS

To Clear Clogged Drains. 1st. Remove all water possible from drain. 2nd. Never pour cleaner in dry form directly into drain. 3rd. *Dissolve one can in 1 quart boiling water* in 3 gallon iron or enamel pail, Never Aluminum. Use double dose for obstinate stoppages. 4th. Caution: Pour contents of can into pail Slowly, stirring with stick. 5th. Pour solution slowly down drain. 6th. Give 8 hours to work. After solution drains away, flush with plenty of hot water.

IMPORTANT: PREVENT CLOGS, PEP UP SLOW DRAINS—keep clear and sanitary by using one-third can weekly. Keep cover on tight or 'kick' will be lost.

'Mule Kick' is pure, powerful, *safe. Contains* no disguised perfumes, *no* DANGEROUS *'bubbling' adulterants, causing injurious spray, explosive gases,* harmful fumes. 'Mule Kick' will not dissolve broken glass or metal obstructions. It attacks the grease that catches coffee grounds, matches, hair, lint causing stoppages, and releases it. Follow directions closely. 'Mule Kick' will destroy linoleum. (Emphasis ours.)

J. A. SEXAUER MFG. CO. INC.

NEW YORK CITY NIAGARA FALLS, ONT.

Copyrighted 1931, J. A. SEXAUER MFG. CO. INC.

. . . .

FOR HEALTH'S SAKE

Keep all drains clear and sanitary by using one-third can 'Mule Kick' weekly. They are natural breeding places for TYPHOID, influenza and other germs when slow running or clogged. A solution of one-third of a can has many uses about the house: 1st. Use weekly for ice-box, lavatory, sink, toilet, and bathtub drains to prevent clogs. 2nd. To clean and deodorize garbage cans. Swab with rag on stick; let stand half hour, then empty in sewers or cinders. Rinse and dry in sun. 3rd. To clean stove burners, cooking tops, burned cooking utensils (except aluminum) greasecaked tools and machine parts.

To thaw frozen pipes, mix 2 full-can solution as directed and pour into pipe.

KEEP AWAY FROM HANDS, face, clothing, linoleum, aluminium. See antidotes for external and internal caustic burns.

POISON

This Cleaner contains Sodium Hydroxide.

ANTIDOTES—CALL PHYSICIAN

EXTERNAL:

Flood with water, then wash with vinegar.

INTERNAL:

Give vinegar, or juic of lemon, grapefruit, or orange, copiously.
Follow with olive oil.

EYES:

Wash out with 5% boric acid solution.

CONTAINER MADE IN U. S. A." (380a-383a)

Before using the "Mule Kick" plaintiff and Nixdorf asked Mr. and Mrs. Taylor, tenants of the second floor apartment, whether they had put anything into the stopped sink (209a). They told the men they had not (209a). In strict conformity with the instructions on the "Mule Kick" label, plaintiff and Nixdorf removed all the water from the drain (210a). In further conformity with those instructions, they dissolved the contents of a can in boiling water in two batches, mixing and stirring each in a pail until the "Mule Kick" dissolved (213a). The solution was then emptied into the drain and Nixdorf and plaintiff left the premises (213a, 214a). Plaintiff returned the next day to see whether the "Mule Kick" had freed the stoppage (214a, 215a). Upon running some hot water into the sink he found that the stoppage still blocked the free flow of water (215a). Plaintiff then prepared another can of "Mule Kick" in accordance with the directions on the can which stated: "Use double dose for obstinate stoppages." Then he left the premises (215a, 216a).

In the event that the "Mule Kick" was not successful, plaintiff knew that the floor boards would have to be removed to expose the piping, and he realized that such a step required the owner's permission (216a). Plaintiff therefore telephoned his office and requested that such permission be obtained (216a).

Plaintiff returned the next day (216a). The sink was still clogged (218a). It was now apparent that other methods would be required to free the stoppage (218a). The drain pipe from the sink ran down through the flooring of the second floor, through a wall and below the floor of a pantry room on the first floor (218a). Plaintiff removed the floor boards at the juncture of the pantry wall and floor on the first floor (219a). This exposed the place at which the stopped pipe joined another pipe at a 45 degree angle which then ran down to a soil pipe (328a). There was a removable metal plug located on the surface of the angled section of the pipe (219a, 220a).

Plaintiff gingerly loosened the plug and, feeling no pressure behind the plug, removed it completely (220a). At this point in the pipe there was a small seepage but no flow of water (220a). Plaintiff tightened the plug back into the hole (221a). Believing that ice might be forming below the plug, plaintiff briefly applied a Prestolite Heater (a heating device) to the portion of the pipe below the plug (222a). He had no reason to fear applying heat since the label itself called for mixing the solution in *boiling* water. He then attempted to push a flexible metal "snake" from the second floor trap down through the pipe to free the stoppage (222a). This did not loosen the stoppage (222a).

Plaintiff returned to the first floor pantry room and, standing approximately eight feet across the room from the exposed pipe, he tried to determine what to do (223a). There was a sudden, sharp explosion and a large amount of material burst from the pipe at the point where the plug was located, and with a great and violent force it

exploded and spattered over the entire room and caught plaintiff flush in the face and on the body (223a). This spattering material, largely comprised of "Mule Kick", burned plaintiff very severely about his body and particularly his eyes (223a-224a). He immediately doused his eyes with water from a nearby sink, but to no avail (224a). The swift, corrosive action of the lye had eaten into his eyes and eyelids and rendered him totally and permanently blind (497a, 498a).

As we have indicated above, the plaintiff's case against Sexauer is grounded in the legally deficient statements of its "Mule Kick" label, especially since it gave no warning at all that it would or could spatter at all, let alone all the way across the pantry. Indeed its label specifically assured the petitioner that if mixed in solution of boiling water it would not "contain . . . explosive gases and would not cause injurious *spray*". Plaintiff's case against Diamond is that Diamond in checking Sexauer's label "Mule Kick" knew before this accident that Sexauer's label did not warn of spattering and held forth false assurances of safety therefrom and did nothing about it.

Plaintiff submits that each of the following statements of the "Mule Kick" label constitutes a legally inadequate, misleading and false statement which was proven. Each standing alone would raise a prima facie case of negligence against Sexauer. In concert, they underscore the magnitude of the error in granting judgment for the defendant. The same is true as to Diamond, who, despite its awareness of the deficient label of Sexauer, did nothing to protect the unsuspecting public from the hazards it knew the public would and could face in using this product.

What are the defects in the label?

(a) The label describes "Mule Kick" as *safe*. In truth it is extremely dangerous.

(b) The label failed to use the words "Lye" or "Caustic Soda". This absence failed to warn the public that it was that dangerous material.

(c) The label stated that "Mule Kick": "*Contains* no disguised perfumes, no DANGEROUS *'bubbling' adulterants, causing injurious spray, explosive gases,* harmful fumes". In this respect it was misleading, for this product in combination with zinc did cause explosive gases which did explode, and its injurious spatter did blind the plaintiff.

(d) The label ignored the specific warning given by Diamond in its labels on its drums that this product would spatter, explode all over and would burn the eyes. This was a breach of defendant Sexauer's obligation to warn of the hazardous propensities of its product. That breach directly resulted in the accident in suit. Pennsylvania law says so as we shall show *infra.*

(e) These legal defects in the "Mule Kick" label also raise a prima facie case against Diamond because it knew that Sexauer had not printed on its "Mule Kick" label the very warning that Diamond had given Sexauer that this product would violently spatter. Diamond knew that "Mule Kick" was dangerous for the use that Sexauer was selling it. Absent the warning that Diamond had on its own label in respect to "violently spatter", Diamond had no reason to believe that the actual users of Sexauer's product such as petitioner, would know of this unwarned danger of "Mule Kick". Yet it stood silently by and did nothing to compel Sexauer to take any measures of any kind to inform purchasers such as petitioner of those terrible dangers, after it knew that Sexauer was not giving the actual users adequate warning about the explosiveness and spattering in solution of this soda.

To understand just how legally defective the "Mule Kick" label was, it is necessary to understand the properties and use of the material. Sodium hydroxide (the chemical term for cleaners of this type) is a chemical which eats away stoppages (908a, 909a). This is generally a gradual process depending upon the nature of the stoppage and/or the pipes in which the stoppage occurs. Some manufacturers of drain pipe chemical cleaners intentionally add

adulterants such as aluminum or zinc to their cleaners (906a). These adulterants are deliberately packaged in the cleaner to cause the production of propulsive gases in clogged pipes (1011a). This is very hazardous since the presence of gas maximizes the danger of explosion or spraying of the corrosive cleaning matter, or both (728a).

The "Mule Kick" label was deliberately designed to create the impression that Sexauer's product was safe. It said so. It also said it contained no "DANGEROUS bubbling adulterants, causing injurious sprays, explosive gases, harmful fumes". It was not safe, for in the kind of chemical combinations which both Sexauer and Diamond expected would occur, "Mule Kick" would cause explosions and spatters.

It is axiomatic that sellers such as Sexauer and manufacturers such as Diamond contemplated that in its ordinary use this type of product would be placed into galvanized pipes which are partly made of zinc and contain various foreign substances including metallic materials. It is equally apparent that they would expect, indeed intend, that the solution which ultimately blinded plaintiff would be placed into metal pipes.

Plaintiff's proof showed that a section of the metallic surfaces of the pipes in question was galvanized, and a galvanized surface will react chemically with sodium hydroxide to create explosive gases. This is so because galvanized pipe contains zinc which in contact with sodium hydroxide will produce hydrogen, a notoriously volatile and explosive gas (728a). As a matter of fact, zinc is one of those adulterants which some manufacturers deliberately add to their sodium hydroxide drain cleaners to give them the propulsive effect of a gas explosion once they are dissolved in water. Presumably the manufacturers of those products give clear and distinct warning of that violent explosive spattering characteristic. Here the label stated that no adulterants were put in and a user could presume that "Mule Kick" would and could not spatter at least not that

violently. That effect is precisely what happened in this case and yet plaintiff not only got no warning of this but in effect the "Mule Kick" label assured him that it would not happen.

Plaintiff's proof showed that on this occasion the destructive "Mule Kick" solution chemically reacted with the metal of the pipes into which it was placed to produce an explosive gas (727a-729a). The gas in turn exploded, suddenly drove the stoppage down the pipe, forced the plug from its seat and sprayed the corrosive "Mule Kick" into plaintiff's eyes (730a, 731a).

The fact is that the "explosive gases" which the "Mule Kick" label said would not be created were indeed created.

Plaintiff's expert, Dr. Willard, Professor of Chemistry at Pennsylvania State University testified as to the cause of the accident and the cause of the explosive blow-out of the plug and the spraying out of the material from the pipes all the way across the pantry into the petitioner's eyes, some ten feet away and six feet up into the air. Because of the importance of the testimony, we quote it:

> "In my opinion the metallic fragments, which were in the pipe, the zinc coming from the elbow, the iron, the aluminum fragments reacted chemically with the sodium hydroxide to liberate the hydrogen" (727a).

and again:

> "I believe two things caused the plug to blow out and cause this material to blow out. One was the production of hydrogen here, one was the heated solution of lye or sodium hydroxide or Mule Kick here." (730a).

Both defendants knew this could occur. Both defendants knew that the "Mule Kick" was not safe as it was represented to be. Both knew or should have known that it could cause an explosive spattering of the solution. Both defendants knew that once that explosion occurred extremely corrosive lye solution could be blown into the face and eyes of unsuspecting users such as the plaintiff.

The trial judge did not apply Pennsylvania law. His decision on the established facts in the record was completely at odds with Pennsylvania law and ignored the clear impact, instruction and teaching of the landmark case of *Maize v. The Atlantic Refining Co.*, 352 Pa. 51, 41 A. 2d 850 (1945) which controls this case directly. Under the decisional law of this court petitioner was entitled to Penna. law. Instead he applied as did the Court of Appeals majority, the *general* law on the subject quoting cases from other jurisdictions. But Pennsylvania law is different. It is a giants' step ahead of other jurisdictions cited and quoted in advancing and protecting the public interest and safety in such cases as this. It imposes liability for false or inadequate or illegible labels that fail clearly to warn of the inherent dangers of dangerous products sold for use by the public. It imposes a duty on the manufacturer and distributor to know the chemical and reactive properties of its product. *Pope v. Reading Co.*, 304 Pa. 326, 156 Atl. 106 (1931). As a result the judge in confusion and miscomprehension of the proper law to apply under the urging of counsel for respondent directed a verdict for respondent as to Diamond at the conclusion of the evidence thus denying petitioner a right to trial by jury as to Diamond and after a hung jury as to Sexauer he granted judgment on the record against the plaintiff.

Under the circumstances above, petitioner contends that the trial judge originally erroneously ruled that the petitioner did not prove a prima facie case against both of the respondents and that the Court of Appeals was in error in ruling two-to-one that the petitioner had not proved a prima facie case against both respondents. This action by the lower court affirmed by the Court of Appeals in its opinion two-to-one as to Sexauer deprived the plaintiff of his right to trial by jury as guaranteed by the 7th Amendment. *All of which was brought on by the trial judge's failure to apply Pennsylvania law as required to this purely Pennsylvania accident under the law enunciated in Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

REASONS URGED FOR GRANTING THE WRIT.

1. Even though the record contained explicit testimony that the cause of the accident was that defendant's dangerous product produced hydrogen which exploded—a danger which defendant never warned against and explicitly stated could not happen, the district court and the Court of Appeals in a two-to-one opinion sustained a directed verdict for the defendant because "the cause of the accident was completely unknown". By so doing these courts have deprived the appellant of his right to a trial by jury as guaranteed by the Seventh Amendment of the Constitution of the United States.

2. The majority's mistreatment of *Maize v. The Atlantic Refining Company*, 352 Pa. 51, 41 A. 2d 850 (1945) and *Pope v. Reading*, 304 Pa. 326, 15 A. 106 (1931) is a direct violation of the law as stated by this Court in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938).

3. The majority of the Court of Appeals below failed to apply Pennsylvania law as stated in *Maize v. The Atlantic Refining Company, supra* and *Pope v. Reading Co.*, 304 Pa. 326, 156 Atl. 106 (1931) and *Antonelli v. Tumolo*, 390 Pa. 68, 73, 132 A. 2d 285 (1957) and this is a direct violation of the law as stated by this court in *Erie R. R. Co. v. Tompkins, supra.*

4. This Court's views as to Reasons 2 and 3 remain open for decision because this Court in *Byrd v. Blue Ridge R. E. Corp.*, 356 U. S. 525, 539, 78 S. Ct. 893, 901 expressly left open for decision later the constitutional question whether the federally protected right to trial by jury embraces the issues of causation and burden of proof. See n. 10, 11 at Page 539 in *Byrd v. Blue Ridge, supra,* opinion. Now this judge-jury issue arises head-on in this case.

Introduction.

We recognize at the outset that this court is deluged with business and with momentous problems both in civil rights involving alleged criminals and the violation of the civil rights of racial groups so that it cannot attempt to review all of the decisions by the various Courts of Appeals with respect to whether or not a jury trial has been denied the plaintiff under the Seventh Amendment. However where there is not merely a question involving the deprivation of the right to trial by jury under the Seventh Amendment, but also whether a litigant has been deprived of the rights that would have accrued to him had the law of the correct jurisdiction whose decisional law does control been applied as it is required to be under *Erie Railroad Co. v. Tompkins, supra,* doctrine, then we respectfully submit that denying the right to trial by jury in such a case under those circumstances is a two-fold reason for the intervention by this court in protection of that very important right. And we shrink from the thought that this court might deny certiorari where the petitioner has been deprived of a right to trial by jury which would result in his not being afforded fair compensation for the awesome injuries he has suffered—total, complete, irrevocable blindness in both eyes at so young an age when his responsibilities as a husband and father are so great, where there is at the least a pure conflict of evidence which makes out a prima facie cause of action. But we are confident that this court will again here as it has so conscientiously done in the past, keep close scrutiny over the lower courts to assure that the right to trial by jury will not become meaningless. For this is what unfortunately happens when trial judges' allow themselves to become influenced by their own view of where the weight of the conflicting evidence lies to the point that they sometimes enter a directed verdict, sometimes try to charge a plaintiff out of court or enter judgment n. o. v. if the plaintiff up to that point has prevailed despite such judicial enterprise.

We also recognize that there are some instances in which a jury should not be allowed to pass upon the decision and that there should be directed verdicts for defendants in particular cases bare of all supportive proof of the plaintiff's theory. But that is not this case.

This case we reiterate is an outstandingly strong case of liability under Pennsylvania law, against both respondents [2] where the petitioner who has been totally and permanently blinded in both eyes at the age of 34 has been deprived at this juncture of his right to a trial by jury by the district court and by a two-to-one decision in the Court of Appeals caused by a multiplicity of judicial errors.

I. Petitioner Has Been Deprived of His Right to Trial by Jury as Guaranteed by the Seventh Amendment by the Actions of the Courts Below.

At the outset, we submit Judge Friendly's opinion as a dissent points out precisely what the majority has ignored, namely, the evidence as to the cause of the accident as pointed out by Dr. Willard. Judge Friendly points out in the beginning of his opinion "I believe the majority's affirmance of the dismissal of the complaint with respect to

2. Diamond as the manufacturer and supplier for use of dangerous chattels for use by third person falls squarely within Restatement of Torts, § 388. This section reads "Chattel Known to be Dangerous for Intended Use—One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the suppliers should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." See also note to 388 on p. 307. The record contains clear proof that Diamond knew that Sexauer had deleted vital warnings from the label. Mr. Sexauer (679-680a) said that Sexauer's label had been checked and approved by Diamond Alkali.

the defendant Sexauer, unwarrantably deprives the plaintiff of his right to a jury trial" (1868).

The crux of the error, in the majority opinion, is succinctly stated by Judge Friendly in his dissent when he says, "the majority opinion, as I understand it, rests on the basis that he [the plaintiff] did not present sufficient evidence to show what the cause of the accident was and it would, therefore, have been impossible for Sexauer to have prepared a warning that it would have prevented the catastrophe" (1868). As proof that this is the crux of the majority opinion, we quote from it:

> ". . . what should have been put on the label which might have prevented this accident? No answer can be given to this question because the cause of the accident is completely unknown" (1860).

Thus, if it can be demonstrated that that conclusion is wrong, the decision is wrong and plaintiff has been deprived of his right to a trial by jury under the Seventh Amendment.

The majority opinion shows how flatly wrong it is for the majority itself has accurately recognized that Dr. Willard:

> ". . . concluded that there were two causes of the accident, (1) the production of hydrogen, and (2) the heated solution of lye" (1859).

The majority did not, nor could it have held, that Dr. Willard's testimony was legally insufficient to prove the cause of the accident. As a matter of law, it, therefore, presented a prima facie case of causation and this blind man has been deprived of his right to a trial by jury by the decisions of the two lower courts.

Judge Friendly after concluding that plaintiff's proof might be enough even without the expert, then said at p. 1869:

> "However, the proof went considerably beyond this. Dr. Mary Willard, Professor Emeritus of Chem-

istry at Pennsylvania State University, *testified that in her opinion the accident was caused by the production of hydrogen from the combination of zinc with the heated solution of sodium hydroxide.* She thought that the production of hydrogen above the stoppage forced the stoppage down through the pipe past the clean-out hole and that this pressure expelled the plug and the caustic solution through the hole. Another theory, consistent with a statement by Stief in applying for workmen's compensation benefits although in conflict with his trial testimony, is that there were two stoppages, one of ice above the plug and another of grease and debris below; that the melting of the ice by the torch caused some of the Mule Kick solution to fall through the pipe past the clean-out hole where it was stopped by the second blockage; and that the reaction of the Mule Kick with zinc in the pipe at the high temperature created by the torch produced hydrogen, which expelled the plug and caused the mixture to spurt through the hole."

He then stated (p. 1870):

> "If twelve practical people can be persuaded that Stief's theory of the accident was more plausible than Sexauer's, I fail to understand how a judge could say they had gone beyond the bounds of reason."

And then concluded (p. 1872):

> "Depriving Stief of jury determination of the common sense questions on which his case against Sexauer depends runs wholly counter to the trend of Supreme Court decisions over the past decades."

There can be no doubt that this is a fact.

This is the first case presenting to this court the question of whether this procedural adjectival law [evidence] point as stated by *Lavender v. Kurn, supra* applies with equal force in ordinary diversity tort matters as well when tried in the several district courts since *Byrd v. Blue Ridge*

Rural Elec. Cooperative, 356 U. S. 525, 538, 539, 78 S. Ct. 893, 901, 2 L. Ed. 2d 953, where this issue was specifically reserved and not then decided.[3] Judge Friendly adopted the modern rule that gives the widest possible scope to the jury function and its verdict. The majority applied the restrictive rule that calls for the elimination of every other possibility by the plaintiff before he can prevail even though there be a clear conflict of opinion as to causation, depending on which facts or inferences are accepted. We respectfully submit this court approved the approach followed by Judge Friendly here when it wrote *Lavender v. Kurn, supra* and in which this court held at p. 653:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Is not the rule of *Lavender v. Kurn,* 327 U. S. 645 (1946), an FELA case as adopted by Pennsylvania in *Antonelli v. Tumolo,* 390 Pa. 68, 73, 132 A. 2d 285 (1957) as its basic

3. "Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action. Footnote 10, p. 539."

test of submissibility as to causation binding on all Federal Courts or at least in diversity actions controlled by Pennsylvania law because the accident and all contacts occurred and exist there, or must a plaintiff eliminate every other possibility that arises from the evidence except those supporting him?

The question remains open as to whether the rule of *Lavender v. Kurn, supra,* as adopted in *Antonelli v. Tumolo, supra,* relating to causation is binding on all federal courts or at least in diversity actions controlled by Pennsylvania law because the accident and all contacts existed there. There remains open therefore the question of whether the plaintiff must eliminate every other possibility that arises from the evidence as to causation excepting those supporting him or whether it suffices that there be some evidence supporting him that per se requires the case to be submitted to the jury on the issue of causation.

It is true that *Lavender v. Kurn* was an FELA case, but we do not think that rule of law was adopted by this court solely for Federal Employer's Liability Act cases or Jones Act cases. We think it must be applied in all actions including ordinary diversity tort cases. Common justice would seem that what is a fair rule of law in those cases must be held to be equally fair for other actions not involving work sustained injuries. Indeed this court did grant certiorari and reversed without an opinion the holding below of *Swafford v. The Atlantic Coastline Railroad Company,* 350 U. S. 807, 76 S. Ct. 80 (1955) which was not FELA, but a grade crossing case where plaintiff was put out of court as a matter of law. Apparently the failure to write an opinion has caused the impress of that decision to lose its impact on some judicial minds in the lower courts and an opinion on the subject therefore is of vital importance since so much litigation in the several federal courts of the United States are ordinary diversity actions and this question must arise over and over again as a matter of daily rote.

The court has repeatedly ruled that a case such as this must be decided by a jury. In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U. S. 355, 82 S. Ct. 780 (1962), a diversity case, it held at 369 U. S. 360, 82 S. Ct. 784:

> "As we recently stated in another diversity case, it is the Seventh Amendment that fashions the federal policy favoring jury decisions of disputed fact questions. *Byrd v. Blue Ridge Rural Elec. Cooperative,* 356 U. S. 525, 538, 539, 78 S. Ct. 893, 901, 2 L. Ed. 2d 953. And see *Herron v. Southern Pac. Co.,* 283 U. S. 91, 94-95, 51 S. Ct. 383, 384, 75 L. Ed. 857."

Byrd v. Blue Ridge Rural Elec. Cooperative, supra, has become a leading and outstanding case in this country since its decision several years ago. That case involved a simple question of fact in a diversity matter. No federal issues were involved. Purely local law was involved—the law of South Carolina. There was not even that extra twist that exists in the instant case where the judge of one district was interpreting and applying the law of another state to the case before him which he is compelled to apply as that state would apply it were it tried in that court. Nonetheless because the Seventh Amendment can bear no intrusion upon it if it is to survive and be meaningful and effective, this court wrote the opinion in that case and followed it with *Atlantic and Gulf Stevedores v. Ellerman Lines, supra,* as well as having done the same in *Herron v. Southern Pac. Co., supra,* so many years ago.

There is only one other conceivable reading of the basis for the majority decision. It is found in the following quotation:

> "If there had been any testimony from which it could be inferred that it was reasonably foreseeable that contact of Mule Kick with zinc found in galvanized pipe would cause formation of explosive gases, plaintiff would be on firmer ground. But plaintiff was un-

> able to produce any evidence that would indicate that such a phenomenon as here occurred had ever happened during the generation Mule Kick had been on the market (some 3,800,000 cans sold) despite the fact that galvanized pipe is "probably the most common of all types of pipe" (Pl. Reply Br., p. 2)." (1860)

Having thus raised the issue of foreseeability, rather than reviewing the evidence and the law, the opinion confesses that its conclusion that the accident was not foreseeable is based upon the failure of plaintiff to produce proof that similar accidents had happened before. To reach this conclusion, we respectfully submit that the majority must have ignored the law and the facts.

With respect to the law, as Judge Friendly points out in his dissent, this Court ignored its own New York case of *Butler v. L. Sonneborn Sons, Inc.*, 296 F. 2d 623, 626 (C. A. 2, 1961) where it said:

> "But, especially when injury is likely to be serious if trouble occurs, even slight foreseeability may warrant, and a long history of good fortune will not necessarily exclude, a conclusion by the trier of the facts that prudence requires the manufacturer to take on so small an added burden."

Indeed to sustain its holding the majority below had to ignore and/or overrule *sub silentio* a case cited in our brief below, *Pease v. Sinclair Refining Co.*, 104 F. 2d 183 (C. A. 2, 1939) when Judge Clark speaking for the Court said at 185:

> "This, therefore, is one of those cases where not unusual human conduct produces results so unexpected and tragic as to startle and amaze. Yet legal precedents and human experience combine to show that *bizarre accidents are far from unlikely, and recovery cannot be denied because of the uniqueness of the happenings.* Usually judicial rationalization is couched largely in terms of 'foreseeability', but it is obvious

> that, if it is the exact accident which must be foreseen, then recovery must regularly be denied (as it is not). Perhaps in this class of cases, it is easier to reach decision than to explain it, for explanations tend towards abstract generalities, under which are lumped all sorts of accidents, from railroad and automobile collisions to chemical explosions. *At any rate, given some culpability on the part of a defendant,* i.e. some conduct involving a departure from the natural, and hence the reasonable, then *the courts look more for the possibility of hazard of some form to some person than for an expectation of the particular chance that happened.*" (Emphasis supplied.)

That the law of Pennsylvania is not as stated by the majority below is very evident from *Carpini v. Pittsburgh and Weirton Bus Company,* 216 F. 2d 404, 407 (C. A. 3, 1954), a case strikingly analogous on its facts. There: "General Motors [the defendant bus manufacturer] cited the experience over the years with this type of design, tending to show that despite the millions of miles vehicles of this sort have traveled on highways no bus accident of the type here involved has been reported."

The unanimous Court of Appeals for the Third Circuit held, per Goodrich, J., that the weight of such evidence

> ". . . was for the trier of the fact. But, of course, it was not conclusive . . ." (at 407)

Such evidence should not be conclusive here either. The majority is not only in conflict with the clear law in this and other Circuits, but it is substantively inconsistent within its own opinion, for at the outset it held that ". . . the fact that the accident was 'most unusual' is not to be considered in deciding whether the directed verdict was justified" (p. 1852). Now, we respectfully submit, it has done exactly that.

The Court of Appeals for the Second Circuit is not free to ignore or rewrite law on this point of foreseeability

dependent upon proof of similar accidents that occurred before, other than in cases that arise out of a state which adopts that principle of law as its basic law. And as we have pointed out in *Carpini v. Pittsburgh and Weirton Bus Company, supra,* the law of Pennsylvania is opposed to the view expressed by the majority and adopts explicitly the view noted by Judge Friendly in his dissent in this case which followed *Butler v. L. Sonneborn Sons, Inc.,* 296 F. 2d 623, 626 (1961). So that that red herring proposition of foreseeability set up as an obstacle to recovery in this case cannot legally affect this petitioner who comes from Pennsylvania supported by the law of Pennsylvania as set forth in *Maize* and *Pope, supra,* for trial in the Second Circuit.

With respect to the facts, the majority below completely ignores the statement from the defendant's own mouth—Mr. Springhorn, formerly sales manager and at the time of trial the assistant to the President of J. A. Sexauer Manufacturing Co., Inc. He admitted that "Mule Kick" in combination with zinc produced hydrogen—a highly explosive gas. *He actually thought this warning was on the can. In fact there was no such warning. His mistaken belief that it was on the can was certainly evidence from which the jury could find that he knew that users of "Mule Kick" should have been warned by the label that hydrogen would have been produced.* It is most unfortunate that the majority failed to appreciate the crucial legal significance of this evidence. In truth, it was a crushing, devastating admission. It proved that defendant itself recognized the very exact awful danger that blinded this petitioner.

But what is also important on this issue is what the majority has done here. Plaintiff produced no proof that an accident such as this had occurred before (it is a simple fact of life that proof of prior accidents would have been within the control of the defendant). However, defendant also produced no proof that they did not have reports of

previous accidents such as this. The majority has used this lack of proof to deprive the plaintiff of a jury trial as guaranteed by the Seventh Amendment, even though the plaintiff proved that a real and dangerous hazard existed from the use of their material. As Judge Friendly so accurately said:

> "The majority argues against this that there is no evidence of previous experience of Mule Kick having generated sufficient hydrogen gas through contact with galvanized pipes to cause an explosion. *Of course the absence of any evidence to this effect does not mean that no such incident had ever occurred.* In any event the jury could find that since the hazard was known, Sexauer was under a duty to warn against it and certainly under a duty not to say things that would invite it." (1871)

In recapitulation, the point is that Pennsylvania law commands the submission of the issue of negligence and causation and its corollary questions to the jury. A Pennsylvania court would have submitted it to the jury. *Pope v. Reading, supra; Maize v. Atlantic Refining Co., supra,* and *Antonelli v. Tumolo, supra* all say so. It is a Pennsylvania case that states what is Pennsylvania law. But Federal Courts in New York did not follow Pennsylvania law in any respect. It barely noted *Maize, supra.* Thus this Court's protection of this vital right is beseeched. The built-in novel questions of law found in the case, being national in scope of importance need determination, analysis and in part restating in this setting. This Court some years ago reserved for decision in the future. That day is now.

At the outset, we indicated that this Court can only protect a plaintiff's right to trial by jury by granting certiorari in specific cases where plaintiff has obviously been deprived of his right to trial by jury. We also recognize that this court would face an exceedingly burdensome, if not impossible, task if it had to read the entire record in every case to determine whether or not plaintiff has been

deprived of his right to a trial by jury. However, we respectfully submit that in this instance such reading is not necessary. We have attempted to pinpoint the issue. The majority opinion hinges upon the fact that the plaintiff did not prove the cause of the accident. Suffice it to say, that page 727 of the record, Dr. Willard said:

> "In my opinion the metallic fragments, which were in the pipe, the zinc coming from the elbow, the iron, the aluminum fragments reacted chemically with the sodium hydroxide to liberate the hydrogen."

She also said at 730:

> "I believe two things caused the plug to blow out and caused this material to blow out. One was the production of hydrogen here, one was the heated solution of lye or sodium hydroxide or Mule Kick here."

Judge Friendly forceably pointed out this testimony and he concluded that this blinded petitioner was deprived of his right to trial by jury. We submit that he is correct and that this Court in the interest of preserving that right of a jury trial governed by the use of the correct principles of law which is, after all, the foundation of our system of justice should grant certiorari and reverse in this shocking case.

II. The Court of Appeals for the Second Circuit, in Deciding This Case, Has Ignored the Command of Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938).

In *Erie Railroad Company v. Tompkins, supra,* the plaintiff was injured in Pennsylvania by a passing freight train while walking along the defendant's right-of-way. The plaintiff brought suit in the Federal Court for the Southern District of New York. The defendant, after a jury verdict for the plaintiff, argued that the only duty owed to the plaintiff was that owed to a trespasser, since

that was the Pennsylvania law. The plaintiff argued, however, that since there was no statute of the state on the subject, the railroad's duty and liability were to be determined in the Federal Courts as a matter of "general law". The Court stated the reason why it granted certiorari in these words:

> "Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari." 302 U. S. 671, 58 S. Ct. 50, 82 L. Ed.

The lower courts held that under the doctrine of *Swift v. Tyson,* 16 Pet. 1, 18, 10 L. Ed. 865, they would apply "general law" and thus allowed a recovery. The Court then held:

> ". . . Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

This is the crux of this case. The federal district court in New York did not concern itself with this decision. On the other hand, it ignored this mandate. It refused to recognize the forward looking law of Pennsylvania. As an outstanding example—in the sense of avoiding Pennsylvania law, the lower court never mentioned, discussed, explained away or distinguished the *Maize* case which so plainly renders the granting of the motion naked legal error. And we respectfully submit here that the majority in the Court of Appeals has ignored this proposition for it has only discussed tangentially the law of the State of Pennsylvania and in that respect, has misconstrued the leading case of *Maize v. The Atlantic Refining Company,* 352 Pa. 51 (1945) and ignored the principle in *Pope v. The Reading Company,* 304 Pa. 326 (1931).

We are the first to admit that Pennsylvania has gone as far in imposing liability in this phase of tort law as any jurisdiction in the United States. Indeed it has been in the avant-garde. As early as 1952, it pronounced this doctrine in *Maize v. Atlantic Refining Company,* 352 Pa. 51, 41 A. 2d 850 (1945) and has abided by that decision ever since. This case stands for the proposition that the manufacturer and distributor of a product will be held to strict accountability for its product and must give clear definite specific warning of all of its characteristics and properties, particularly in the field of human consumption or where human contact might be made with the product to the detriment of the human body. In addition, Pennsylvania has likewise taken the lead and has pronounced the doctrine of *Pope v. Reading,* 304 Pa. 326, 333, where it adopted the ancient doctrine that "every man must have some knowledge of the quality of his beast", 1 Hale P. C. 430, and use appropriate means to keep that beast from harming people. These doctrines were interpolated into the tort decisions with respect to buildings and into products liability cases.

In *Rockwell v. Stone,* 404 Pa. 561, 173 Atl. 2nd 48 (1961), a case where plaintiff was negligently injected with sodium pentothal, the jury was instructed, which instruction was affirmed, as follows:

> "The law of Pennsylvania is that anyone dealing with and dispensing dangerous substances to another is under *the duty of a high degree of care* and must use every scientific method at the disposal of such person or persons to insure that no harm will result from the use or dispensing of that dangerous agency to another." (Emphasis supplied.) (Pages 571-572 of the Opinion)

It may well be that in other jurisdictions such as New York the law has not advanced as far nor has the responsibility attached as vigorously and rigorously as it has in Pennsylvania. It may well be also that this led the Court below into ignoring the mandate of *Erie v. Tompkins, supra.* But we are trying a case that occurred in Pennsyl-

vania to which Pennsylvania law attaches itself, and whether the case be tried in Pennsylvania or tried in New York state court or tried in the Federal Court in New York, Pennsylvania law, as the Pennsylvania courts would interpret it, must be applied in that court. This was not done here. This is a direct violation of the principle of *Erie v. Tompkins, supra.*

As has been stated, Pennsylvania has taken the lead in holding a manufacturer or distributor responsible for mislabeling or inadequateily labeling a product which is dangerous. It did so in *Maize* and this case is ruled by it.

In that case plaintiff's decedent died when she inhaled fumes from a cleaning fluid which she used in a closed room. In an opinion which leaves no doubt as to the state of Pennsylvania's law, the Supreme Court of Pennsylvania imposed liability because of the inadequacy of the warning on the can even though the can did state in small letters that the fluid should be used only in well ventilated places. The can also had displayed on it the words "Safety-Kleen". On these facts the Supreme Court of Pennsylvania held that the case had to be submitted to the jury.

> "In the instant case it is clear that the court below could not declare as a matter of law that the defendant in displaying as it did the 'cautionary' admonition on its can of Safety-Kleen discharged its full duty under the circumstances and was not guilty of negligence. It is equally clear that the court could not declare as a matter of law that Mrs. Maize's failure to heed the cautionary admonition displayed on the can, as above described, amounted to contributory negligence. *The case was for the jury.*" (Emphasis supplied.) (at 352 Pa. 57, 41 A. 2d 853)

What was clear in *Maize* is equally clear here. Constitutionally this controversy must be resolved by a jury.

In *Maize, supra,* the Court said (352 Pa. 55, 41 A. 2d 852):

> "That the fluid the defendant manufactured and sold for general use in cleaning fabrics is highly dangerous is proven by the tragic result in this case."

By that test this product was highly dangerous. The duty of the defendant is clear.

> "Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care. The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question." *MacDougall. v. Penna. Power and Light Co.,* 311 Pa. 387, 396, 166 A. 589, 592 (1933).

In addition the Court ignores the law of Pennsylvania, as found in *Pope v. Reading Company,* 304 Pa. 326 at 333, 156 Atl. 106, 107 (1931), where the Court said:

> ". . . At common law it was held that every man must have some knowledge 'of the quality of his beast' 1 Hale P. C. 430) and use appropriate means to keep that beast from harming people. Public welfare requires that this same salutary rule apply to the inanimate objects in a man's possession and subject to his intelligent control."

There is not a shred of doubt that Sexauer knew that zinc, as well as aluminum, was a completely expectable material which "Mule Kick" might contact. The Assistant to its President, Springhorn, flatly testified that the label stated that when "Mule Kick" contacted zinc, it produced hydrogen (636(a)-637(a)). When shown the can, he recanted, "I thought it was on the can, but apparently it isn't" (637(a)). One could not prove Sexauer's knowledge of the hazard of the material, or it's foreseeable consequences with more potent documentation.

The entire point, which respondent never faces, is that an explicit warning was imperative and defendant never gave one by telling the user that under reasonably expect-

able conditions, the product would cause an "injurious spray" and highly dangerous "gases". Indeed, it mislead the users by stating that it would not "bubble or spray". And Diamond knowing all this did nothing about its "beast" to protect the unwary public.

CONCLUSION.

1. Petitioner, a young blind man, has been deprived of his right to trial by jury.

2. This court is burdened by broad questions of policy and perhaps may not want to consider what is the only equitable solution.

3. Justice cries out for a grant and reversal in this case.

4. Logic compels the grant.

5. The basic organic law as it interplays between the federal and state systems is deeply involved here and needs clarification.

6. An individual life and the life of his family is involved.

7. This court exists for individuals and principles.

8. If certiorari is not granted an injustice and a grave wound on our jury system will be accomplished.

Certiorari should be granted—the affirmance reversed and a new trial granted.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

AUG 4 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 455.

CLAYTON H. STIEF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.

and

DIAMOND ALKALI COMPANY,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 30-31—September Term, 1966

(Argued September 28, 1966 Decided April 7, 1967)

Docket Nos. 30312-13

No. 30312

30

CLAYTON H. STIEF,

Plaintiff-Appellant,

v.

J. A. SEXAUER MANUFACTURING CO., INC.,

Defendant-Appellee.

No. 30313

31

CLAYTON H. STIEF,

Plaintiff-Appellant,

v.

DIAMOND ALKALI COMPANY,

Defendant-Appellee.

Before: LUMBARD, *Chief Judge,* MOORE and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York, Thomas F. Croake, *Judge*, in consolidated actions for personal injuries which directed a verdict in favor of defendant Diamond Alkali Company, Inc., at the close of plaintiff's case and, after a disagreement by the jury, dismissed the complaint against defendant J. A. Sexauer Manufacturing Company, Inc. Affirmed.

Seymour I. Toll, New York, N. Y. (Charles A. Lord, Philadelphia, Penn., Norman J. Landau, New York, N. Y.) (Richter, Lord & Cavanaugh, Philadelphia, Penn., of counsel), *for plaintiff-appellant.*

Benjamin H. Siff, New York, N. Y. (Gair & Gair, New York, N. Y.), *for J. A. Sexauer Manufacturing Co., Inc.*

J. Roger Carroll, New York, N. Y. (Davis Polk Wardwell Sunderland & Kiendl, New York, N. Y.), *for Diamond Alkali Company.*

Moore, *Circuit Judge:*

Plaintiff (appellant), Clayton H. Stief (Stief or plaintiff), a citizen of Pennsylvania, brought two actions in the District Court for the Southern District of New York to recover damages for personal injuries, one against defendant (appellee), J. A. Sexauer Manufacturing Co., Inc. (Sexauer), a New York corporation, and the other against appellee Diamond Alkali Company (Diamond), a Delaware corporation.

In substance, in the complaint against Sexauer, Stief alleged that, in the course of using a product, packaged and sold by Sexauer, known as "Mule Kick," and advertised as opening clogged drains, he was burned and permanently blinded by a spray containing Mule Kick which issued from a hole in a pipe which he was attempting to clear. Breach of warranty and negligence were charged. A second cause

of action was based upon breach of express warranties of merchantability, safety, freedom from explosion, freedom from dangerous adulterants and of fitness for the particular purpose mentioned on the product as well as breach of implied warranties of safety.

In the complaint against Diamond, the manufacturer of the product, Stief also alleged negligence and breach of warranty.

The cases were consolidated and tried to a jury. During the trial, the breach of warranty issue was abandoned and the trial proceeded on the theory of negligence. At the close of plaintiff's case, defendants moved for direction of a verdict. The court granted the motion, dismissing the complaint as to Diamond, but reserved decision as to Sexauer. The motion for a direction was renewed at the end of the entire case, decision was again reserved and the case was submitted to the jury on the morning of November 5, 1965. That evening the jury reported hopeless disagreement and was discharged.

Some five weeks later, the court, with the benefit of the full transcript of the record, additional memoranda, further oral argument and consideration of cited cases, granted the motion and dismissed the complaint against Sexauer. In a memorandum opinion, the court said: "Suffice it to state that, viewing the facts in a light most favorable to the plaintiff, this court is unable to formulate any reasonable view of them or of the law applicable to this case under which the defendant Sexauer might be held liable to this plaintiff, an experienced plumber who had used the product of the defendant on prior occasions, for this most unusual accident." What "the facts," so considered by the court in reaching this judgment, might have been are not disclosed because the court said: "No useful purpose would be served by a restatement of the facts here."

At the outset, this court must state its views as to the applicable principles of law against which the facts disclosed by the record must be reviewed.

First, the question for the trial court was: were there any facts, or facts from which inferences might be drawn, which should have been sent to the jury for its determination as to whether Sexauer had breached a duty to plaintiff. It was not for the trial court so to decide unless there was a failure by plaintiff to present any facts which met legal standards.

Second, plaintiff's previous experience as a plumber and his knowledge and use of Mule Kick was a relevant fact but certainly not decisive on the question of Sexauer's liability.

Third, the fact that the accident was "most unusual" is not to be considered in deciding whether the directed verdict was justified.

Quite apart from the reasons mentioned by the trial court, the function of this court on appellate review is to examine the entire record to determine whether there were any jury questions.

The Issues on Appeal.

On appeal within the field of negligence, the issues have been narrowed further. Stief states "the plaintiff's case against Sexauer is grounded in the legally deficient characteristics of its 'Mule Kick' label" (Br. p. 6), and that "the essence of plaintiff's case of Sexauer's liability is directed toward that label's inadequacies, untruths, misstatements and misinformation" (Br. p. 2).

Stief's case, as stated in his appellate brief, "against Diamond is based on Diamond's role in checking Sexauer's label 'Mule Kick' from time to time and yet making no suggestion regarding the inadequate warning on that label when Diamond knew of the dangerous properties of the material which Sexauer was selling to an unwarned and unsuspecting public" (Br. p. 6).

Stief contends that "each of the following characteristics of the 'Mule Kick' label constitutes a legal deficiency which was proven," claiming that "each alone would raise

a prima facie case of negligence against Sexauer." These claims are set forth verbatim (Br. pp. 6-7):

> "a. The label describes 'Mule Kick' as safe. In truth it is extremely dangerous.
>
> "b. The label failed to use the words 'Lye' or 'Caustic Soda.' This absence failed to warn the public of the dangerous material.
>
> "c. The label stated that 'Mule Kick': 'Contains no disguised perfumes, no DANGEROUS "bubbling" adulterants, causing injurious spray, explosive gases, harmful fumes.' In this respect it was misleading, for this product in combination with zinc did cause explosive gases which exploded, and its injurious spray blinded the plaintiff.
>
> "d. The label failed to warn that explosive and propulsive gases might be created by reason of contact with pipe materials or foreign materials in drain stoppages. This was a breach of defendant Sexauer's obligation to warn of the hazardous propensities of its product. That breach directly resulted in the accident in suit.
>
> "e. The label failed to warn users of 'Mule Kick' to employ goggles while in the presence of 'Mule Kick.' This was in violation of defendant Sexauer's duty to give users reasonable warning of reasonable precautions to be followed in using its product."

Stief takes the position that the statement on the Sexauer label, namely, "Contains no disguised perfumes, no DANGEROUS 'bubbling' adulterants, causing injurious spray, explosive gases, harmful fumes" is "the gist of the prima facie negligence against Sexauer" (Br. p. 20). The concession is made *arguendo* that "as the label stands it is

not inaccurate," but it is claimed that "however accurate it may be, it is grossly, dangerously incomplete." Stief further limits Sexauer's alleged negligence to making a "'grossly misleading'" statement on the can "when it knew that the product under reasonably expected conditions would cause an 'injurious spray' and would cause a highly dangerous 'explosive gas.' " Stief asserts that he "proved that defendant knew or should have known of 'Mule Kick's' reasonably foreseeable hazardous propensities" (Br. p. 21).

The Plaintiff's Case Against Sexauer.

The question of the correctness of the trial court's dismissal of the complaint must be tested by the proof adduced during plaintiff's case unless there were evidence developed by defendant Sexauer which might have supported plaintiff. For all practical purposes there were four witnesses, Stief, his fellow employee, Nixdorf, his expert witness, Dr. Willard, and one Springhorn, Assistant to Sexauer's President.

Stief.

Stief, a plumber, an employee of the plumbing firm of Everts & Overdeer, Inc., in Lancaster, Pa., on January 25, 1961, was directed to proceed to 5 Locust Street, about a half-block from the office, to attempt to clear a clogged drain in a second-floor apartment occupied by tenants named Taylor. Nixdorf accompanied him. They discovered that the stoppage was in the kitchen sink. Their efforts with a plunger were unsuccessful. After draining the sink trap, they then poured down the drain one to two quarts of hot water which had been mixed with a can of Mule Kick, a caustic soda substance which they carried on their truck and had used for drain cleaning purposes on previous occasions. They prepared the solution in a galvanized pail and followed the instructions on the label which reads in its entirety as follows:

"Mule Kick"

Trade Mark Registered

Clears Clogged Drains—Peps up lazy drains.
Advertised in The Saturday Evening Post and a household favorite for a generation.
12 oz. net.
No odor—No fumes.
Waste Pipe Cleaner.

Directions

To Clear Clogged Drains. 1st. Remove all water possible from drain. 2nd. Never pour cleaner in dry form directly into drain. 3rd. Dissolve one can in 1 quart boiling water in 3 gallon iron or enamel pail, Never Aluminum. Use double dose for obstinate stoppages. 4th. Caution: Pour contents of can into pail Slowly, stirring with stick. 5th. Pour solution slowly down drain. 6th. Give 8 hours to work. After solution drains away, flush with plenty of hot water.

Important: Prevent Clogs, Pep Up Slow Drains—keep clear and sanitary by using one-third can weekly. Keep cover on tight or "kick" will be lost.

"Mule Kick" is pure, powerful, safe. Contains no disguised perfumes, no Dangerous "bubbling" adulterants, causing injurious spray, explosive gases, harmful fumes. "Mule Kick" will not dissolve broken glass or metal obstructions. It attacks the grease that catches coffee grounds, matches, hair, lint causing stoppages, and releases it. Follow directions closely. "Mule Kick" will destroy linoleum.

For Health's Sake

Keep all drains clear and sanitary by using one-third can "Mule Kick" weekly. They are natural breeding places for Typhoid, influenza and other germs when

slow running or clogged. A solution of one-third of a can has many uses about the house: 1st. Use weekly for ice-box, lavatory, sink, toilet, and bathtub drains to prevent clogs. 2d. To clean and deodorize garbage cans. Swab with rag on stick; let stand half hour, then empty in sewers or cinders. Rinse and dry in sun. 3rd. To clean stove burners, cooking tops, burned cooking utensils (except aluminum) greasecaked tools and machine parts.

To thaw frozen pipes, mix 2 full-can solution as directed and pour into pipe.

Keep Away From Hands, face, clothing, linoleum, aluminum. See antidotes for external and internal caustic burns.

Poison

This Cleaner contains Sodium Hydroxide.

External:

Flood with water, then wash with vinegar.

Internal:

Give vinegar, or juice of lemon, grapefruit, or orange, copiously.

Follow with olive oil.

Eyes:

Wash out with 5% boric acid solution.

Container Made in U. S. A.

They then left. The next day, January 26th, Stief returned alone, found conditions unchanged, again drained the trap and poured another can of Mule Kick, prepared as previously, down the drain. This, also proving unsuccessful, Stief informed his office that it would be necessary to obtain permission to remove the flooring in order to expose the pipe line.

On the third day, January 27th, Stief removed floor boards in the second floor pantry, discovered a metal plug covering a clean-out opening in the pipe, removed the plug cautiously lest there be pressure, but found none and no seepage, although there was liquid in the pipe at that point. He then proceeded to the first floor and, removing the pantry flooring, noticed that the drain pipe from the second floor was joined to a sloping pipe under the pantry flooring by means of a 45° galvanized pipe elbow. Just below the elbow on the top of the sloping pipe was another plug-covered clean-out opening. He removed this plug, found no seepage or pressure, saw some flakes of ice above the hole not sufficient to cause a clogging of the drain, and concluded that the stoppage must be between the first and second floors. He replaced the plug, making it "finger tight." To eliminate any trouble from the ice flakes, Stief used a blow-torch in that area to heat that section of exposed pipe. He then returned to the office to obtain a "snake"—a device some twenty feet in length which can be twisted through clogging material in a pipe. This he inserted in the second floor opening. During this operation, there was no sign of pressure, of spraying, or of escaping gases, but also no sign of success in clearing the pipe. Not knowing what to do next, he returned to the first floor and while standing in the pantry doorway about eight feet from the exposed pipe trying to determine his next course, he heard a noise like a firecracker and was hit by a spray containing a sodium hydroxide solution which issued from the clean-out opening with sufficient force to cover the walls and ceiling of the pantry and to cover his face, eyes and upper body. Remedial measures failed and permanent blindness resulted.

Nixdorf

Nixdorf's participation was limited to the use of the plunger and the pouring of the Mule Kick on the first day and to a description of the extent of the spraying observed

by him when he returned shortly after the accident. He also participated in the removal of sections of the pipe at a subsequent date and installed a new line in the apartment.

Dr. Willard

In November 1963, almost three years after the accident, Dr. Mary Willard was given for examination a section of the pipe containing the clean-out opening (from which the spray had issued) and the 45° galvanized elbow. She found at the end of the cut off piece of pipe at a point below (away from the second floor) the clean-out hole a hardened mass of material, which she assumed "was at some other point in the pipe before the accident." She made an analysis of a small sample and found that it contained 1.2% zinc. She also took scrapings from the interior of the galvanized elbow, found zinc present and stated as a chemical fact that zinc and sodium hydroxide will form hydrogen. Upon a factual hypothesis, including assumptions which plaintiff's counsel asserted would be "tied in," Dr. Willard gave her opinion as to cause, i.e., "metallic fragments which were in the pipe, the zinc, the zinc coming from the elbow, the iron, the aluminum fragments, reacted chemically with the sodium hydroxide to liberate hydrogen." She concluded that there were two causes of the accident, (1) the production of hydrogen, and (2) the heated solution of lye.

Dr. Willard also testified that her analysis of Mule Kick showed that it was "well fit for the purpose it was to be used" and that she found no zinc in Mule Kick. She had made no test as to the reaction of Mule Kick in galvanized pipe, new or old. It was her opinion that hydrogen would start evolving from zinc as soon as there was any sodium hydroxide present and that the gas would rise slowly. Her explanation for the gas, if any, not rising was the column of liquid above it, although there was no stoppage at the upper end of the pipe.

Springhorn

This Sexauer employee also testified to the fact that zinc and Mule Kick produce hydrozen. He thought it was so stated on the can—actually the statement was made in the Sexauer catalog that Mule Kick was free of adulterants such as aluminum chips, zinc borings, or other agents which could cause harmful, obnoxious fumes, explosive gases or injurious sprays. (The label stated no "adulterants, causing injurious spray, explosive gases, harmful fumes.")

The Applicable Law

Plaintiff relies upon five characteristics of the Mule Kick label which he claims "each standing alone would raise a prima facie case of negligence against Sexauer" (Br. p. 6).

a. *"The label describes 'Mule Kick' as safe" whereas "In truth it is extremely dangerous."*

The words on the label "pure, powerful, safe." cannot be isolated or read out of context. Stief had used Mule Kick many times before for its intended purpose—in fact, it was the only drain cleaner he used. He had read and re-read the label, which contained warnings that it was "POISON" and that it should be kept away from hands, face, linoleum and aluminum.

Since plaintiff bases his case on the alleged inadequacy of the label, the question immediately arises: what should have been put on the label which might have prevented this accident? No answer can be given to this question because the cause of the accident is completely unknown.

If there had been any testimony from which it could be inferred that it was reasonably foreseeable that contact of Mule Kick with zinc found in galvanized pipe would cause formation of explosive gases, plaintiff would be on firmer ground. But plaintiff was unable to produce any

evidence that it would indicate that such a phenomenon as here occurred had ever happened during the generation Mule Kick had been on the market (some 3,800,000 cans sold), despite the fact that galvanized pipe is "probably the most common of all types of pipe" (Pl. Reply Br. p. 2).

Although the issues whether the likelihood of danger required a warning is normally a jury question, 2 Harper & James, Torts, p. 1546, the plaintiff must show something that should have led the defendant to action. The law requires a plaintiff, in order to establish a prima facie case of lack of warning, to show that the defendant knew, or through reasonable care should have known, of the possibility of the danger. See Dillard and Hart, Product Liability: Direction for Use and the Duty to Warn, 41 Va. L. Rev. 145, 156 (1955); Noel, Manufacturer's Negligence of Design or Directions for Use of a Product, 71 Yale L. J. 816, 830 (1962).

Plaintiff relies heavily on *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A. 2d 850 (1945); *Spruill v. Boyle-Midway, Inc.*, 308 F. 2d 79, 86 (4th Cir., 1962); *Kieffer v. Blue Seal Chemical Co.*, 196 F. 2d 614 (3d Cir., 1952); and *Bean v. Ross Manufacturing Co.*, 344 S. W. 2d 18 (Mo. 1961).

In *Maize, supra,* "SAFETY-KLEEN" appeared in large letters on all four sides of the can. The only warning given was "Do not inhale fumes. Use only in well-ventilated places." The proof showed that the product contained thirty times as much carbon tetrachloride as could safely be inhaled in a room of 1,000 cubic feet. Under the circumstances, the court properly held that the question of whether the defendant had discharged its full duty to the purchaser was for the jury. However, there the defendant knew the strength of its product, the probable area of its intended use (the attention or, better, lack thereof) which would be given the label by the average housewife in using it, and the probable consequences of misuse.

In *Spruill, supra,* a baby had swallowed some of the defendant's product. The child died of chemical pneumonia.

The legend "POISON" was in very small type but particularly determinative was the fact that the defendant had notice of 32 cases of chemical pneumonia (seven infants, four of whom died) during six preceding years. Even there, the court said that it was necessary for the plaintiff to show that "defendants knew, or should have known, that the product was being used, or might be used, in a dangerous manner * * *" (308 F. 2d at 88).

In *Kieffer, supra,* an action against a drain cleaner manufacturer, the sodium hydroxide cleaner contained powdered metal aluminum (none in Mule Kick). The batch contained more aluminum than the formula called for which increased the vigor of its reaction. Furthermore, letters of complaint had been received by the defendant's President so that the defendant was on notice of the danger.

In *Bean, supra,* adulterants, aluminum and zinc chips (absent in Mule Kick), had been added to the powder without any warning of their reaction in water.

The law as to alleged failure to warn cannot be better summarized than in the statement in the opinion in *Jamieson v. Woodward & Lothrop,* 247 F. 2d 23, 25-26 (D. C. Cir.), *cert. denied* 355 U. S. 855 (1957):

> "The cause of action in the case at bar does not arise from any of these. It arises, as we have said, from alleged negligence in failing to warn or otherwise protect the user in the use of the article.
>
> "There are on the market vast numbers of products as to which the law holds the manufacturer to a duty to warn of foreseeable dangers or to provide safeguards against such dangers. But there are also on the market vast numbers of potentially dangerous products as to which the manufacturer owes no duty of warning or other protection. The law does not require that an article be accident-proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against

every injury which may ensue from mishap in the use of his product. Almost every physical object can be inherently dangerous or potentially dangerous in a sense. A lead pencil can stab a man to the heart or puncture his jugular vein, and due to that potentiality it is an 'inherently dangerous' object; but, if a person accidentally slips and falls on a pencilpoint in his pocket, the manufacturer of the pencil is not liable for the injury. He has no obligation to put a safety guard on a lead pencil or to issue a warning with its sale. A tack, a hammer, a pane of glass, a chair, a rug, a rubber band, and myriads of other objects are truly 'inherently dangerous', because they might slip. They cause accidents and injury even more often, we expect, than do rubber exercisers. But the doctrines fashioned by the law for inherently dangerous objects do not encompass these things. A hammer is not of defective design because it may hurt the user if it slips. A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require him to warn of such common dangers. On the other end of the spectrum of praticalities, a manufacturer should not be permitted to market without protection to the user a spray which would kill trees if used at the wrong time, as in *McClanahan*,[1] or a skirt which would otherwise ignite if brushed by a lighted cigarette, as in *Noone*.[2] A manufacturer might be liable for failure to provide a shield or an emphatic warning to users of an electric power saw, but he

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[Court's footnote renumbered]

1. *McClanahan v. California Spray-Chemical Corp.*, 194 Va. 842, 75 S. E. 2d 712 (1953).

2. *Noone v. Fred Perlberg, Inc.*, 268 App. Div. 149, 49 N. Y. S. 2d 460 (1944), aff'd 294 N. Y. 680, 60 N. E. 2d 839 (1945). Cf. *Frank R. Jelleff, Inc. v. Braden*, 98 U. S. App. D. C. 180, 233 F. 2d 671 (D. C. Cir. 1956).

would not be liable if he failed so to provide in respect to a kitchen knife."

b. *The Failure to Use the Words "Lye" or "Caustic Soda" instead of "Sodium Hydroxide."*

Stief knew that Mule Kick had to be handled with care. The label advised him of the precautions which he should take. His testimony disclosed that he took them. The use of the word "lye" would not have added to his knowledge of its characteristics.

c. *The Label's Statements as to no Adulterants.*

The testimony of plaintiff's expert established this to be a true statement. It contained no zinc or the listed adulterants.

d. *The Failure of the Label to Warn that Explosive and Propulsive Gases might be created by reason of contact with pipe materials or foreign materials in drain stoppages or by the use of heat.*

This argument defies and rejects the reasonably foreseeable principle of law. Were plaintiff's contention to be adopted, the seller of every drain cleaner would have to advise the purchaser that, before using, he should clean out the clogged drain, that the clogging material must first be removed and that a sample should be tested to ascertain whether it would be safe to use the drain cleaning substance. Or the clogged pipe would have to be removed and sections or scrapings thereof be tested for possible explosive reactions to Mule Kick. But according to Stief and his fellow employee, Mixdorf, in all their years of experience with Mule Kick in all kinds of pipes they had not experienced any explosive or propulsive reaction of the liquid in any pipe.

Nor is there any basis for speculation that plaintiff's use of the blow-torch to melt the observed ice crystals pro-

duced a hydrogen explosion. If heat had any gasforming effect, the explosion, if such it were, should have occurred when the heat was applied. The proof is uncontradicted that it did not. To the contrary, an appreciable amount of time elapsed thereafter while Stief went to his office to obtain the plumber's snake, returned to the second floor Taylor apartment, used the snake unsuccessfully, and then proceeded to the first floor to consider his next move. Furthermore, there is no claim made by Stief in his enumeration of "legal deficiency" in the label (a-e, *supra*) that a warning as to heat had been negligently omitted or was even required.

As to the timing of the formation of hydrogen gas, it was the opinion of plaintiff's expert that contact between Mule Kick and zinc would create hydrogen immediately, whereas the proof was that the Mule Kick was poured in first on the 25th, again on the 26th with no tangible signs of pressure or gas formation, and that the propelled spray accident did not occur until the 27th. Furthermore, gas if formed by the liquid Mule Kick according to the testimony of Dr. Willard, would rise, being fourteen times lighter than air. Thus, as to the adequacy of the Sexauer label, there was no proof from which the jury could have concluded that Sexauer had notice of any chemical fact or of any experience involving the use of Mule Kick which should have caused it to warn against its use if galvanized pipes might be encountered or against the use of external heat on pipes containing Mule Kick.

e. *The Failure of the Label to Warn that Goggles should be worn.*

At the time of the accident, Stief was actually not working with Mule Kick and had no need to wear goggles. He had just returned from the second floor and was standing at the pantry door on the first floor wondering what to do next. Any warning on the label about wearing goggles when using Mule Kick would not have been applicable at the time.

Plaintiff here presents the same argument as was made in the *Jamieson* case, *supra*, namely, that the case should have been submitted to the jury. Again turning to *Jamieson* for a clear analysis of this argument, we agree with the answer thereto, in the court's statement (247 F. 2d at 33):

> "It is urged that a contest of the sort here involved can just as well be submitted to a jury, without a prior determination of possible liability on the part of the defendant. There is in some sociological circles a philosophy that the burden of damges suffered in accidents with manufactured articles ought to be widely spread, by way of the manufacturer and his available insurance, such as is the plan widely adopted in respect to injuries suffered in employment.[3] But such a plan ought to be adopted, if it is to be adopted, by the voice of the people generally, expressed by the legislative branch of the government. It ought not be imposed by the judicial branch. To be sure, there are many respects in which the development of the common law calls for re-examination and change by the courts. The advances made by the courts in this very field by cases such as *Huset*[4] and *MacPherson, supra,* are illustrations. But so sweeping a change in commercial liability as the change just mentioned is not within that area. We must, when appropriate procedural demands have been made, determine at the outset of an action whether a possible liability in law of the defendant has been indicated by the plaintiff. This is a concept basic in our jurisprudence. It is established, firmly and correctly, that if a defendant has violated no legal obligation, his liability for pecuniary damages must not be submitted to the

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[Court's footnote renumbered]

3. The subject is discussed in an article by Dean Pound, New Theories of Liability, 8 N. Y. Co. L. A. B. Bull. 32 35 (1950).

See also James, Functions of Judge and Jury in Negligence Cases, 58 Yale L. J. 667, 689 (1949).

4. *Huset v. J. Y. Case Threshing Mach. Co.*, 120 F. 865 (8th Cir. 1903).

possible prejudices, sympathies or whims of a lay jury. His basic liability is first to be tested as a matter of law by the judge."

And, as recently stated in *Borowicz v. Chicago Mastic Company*, 367 F. 2d 751, 760 (7 Cir., 1966): "the premise of pecuniary liability for tort is not the mere fact of injury, but injury plus fault. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from a mishap in the use of his product."

The Case Against Diamond

The gist of Stief's argument is that, assuming that Diamond knew the nature of Sexauer's Mule Kick label, Diamond should have insisted upon, or exerted some power or pressure upon Sexauer to provide, a label which would have avoided this accident. However, as in the case of the Sexauer label, since the cause of the accident is unknown, what could Diamond have suggested be added to the label even assuming such a policing power?

Since on the facts here presented, there would have been no rational basis for a jury's conclusion that the accident was caused by an inadequate label, the trial court correctly dismissed the case against Diamond.

Judgment dismissing the complaint against Sexauer and Diamond affirmed. No costs.

FRIENDLY, *Circuit Judge* (dissenting as to Sexauer and concurring as to Diamond):

I believe the majority's affirmance of the dismissal of the complaint with respect to defendant Sexauer unwarrantably deprives the plaintiff of his right to a jury trial.

To have his case against Sexauer submitted to a jury, Stief was merely required to present evidence sufficient to to warrant a finding that his serious injury was caused by a

property of Mule Kick of which Sexauer knew or ought to have known and against which it should have warned. The majority opinion, as I understand it, rests on the basis that he did not present sufficient evidence to show what the cause of the accident was and that it would therefore have been impossible for Sexauer to have prepared a warning that would have prevented the catastrophe. This view rests on too formalistic an approach to the evidence, particularly in the light of the established rule that in determining whether evidence is sufficient to take a case to a jury, all reasonable inferences must be drawn in plaintiff's favor.

On the issue of causation we start with three undisputed facts: At temperatures of 125° Fahrenheit and above a combination of sodium hydroxide and zinc will generate hydrogen gas; there was zinc in the galvanized elbow of the pipe as well as in the clogged material; and, when the liquid escaped from the pipe, there was an explosion the propulsive force of which carried the liquid to the ceiling of the pantry and to a wall eight feet away. These facts alone might suffice to warrant a finding that the generation of hydrogen gas from the reaction of sodium hydroxide with zinc at a high temperature caused the accident. Since the only alternative explanation offered by Sexauer, of a free fall of liquid caused by the melting of the ice, failed to account for the wide spread of the liquid through the pantry, the jury would have been justified in accepting plaintiff's theory. As Judge Medina has recently said, "But there are cases where common sense is more reliable than any amount of expert witnesses, and this is one of those cases." *Achilles v. New England Tree Expert Co.*, 369 F. 2d 72, 73 (2 Cir. 1966).

However, the proof went considerably beyond this. Dr. Mary Willard, Professor Emeritus of Chemistry at Pennsylvania State University, testified that in her opinion the accident was caused by the production of hydrogen from the combination of zinc with the heated solution of sodium hydroxide. She thought that the production of hydrogen

above the stoppage forced the stoppage down through the pipe past the clean-out hole and that this pressure expelled the plug and the caustic solution through the hole. Another theory, consistent with a statement by Stief in applying for workmen's compensation benefits although in conflict with his trial testimony, is that there were two stoppages, one of ice above the plug and another of grease and debris below; that the melting of the ice by the torch caused some of the Mule Kick solution to fall through the pipe past the clean-out hole where it was stopped by the second blockage; and that the reaction of the Mule Kick with zinc in the pipe at the high temperature created by the torch produced hydrogen, which expelled the plug and caused the mixture to spurt through the hole. When Sexauer challenged these theories by asserting that if hydrogen had been formed, it would have bubbled up and been seen by Stief when he ascended to the second floor and put the snake down the pipe, Dr. Willard responded that the gas would have been held down by the long column of liquid in the pipe. Whether this was implausible, as Sexauer claims, is precisely the kind of question that ought to be left for decision by a jury unless the implausibility is such that no rational mind could think otherwise. That was not the situation either as to the matter of bubbling or as to the other element stressed by the majority, the time between Stief's application of the torch to the pipe and the explosion. I see no reason why, in the absence of contrary scientific evidence, the jury could not conclude that the application of the torch might have begun the hydrogen-forming reaction, and that this would have had to continue for five or ten minutes—the time it took Stief to get the snake, place it in the pipe on the second floor, and walk downstairs to the pantry—before enough hydrogen to cause the explosion could have been formed. Not only was there no such evidence, but defendant's expert testified that at 125° F. zinc would react with sodium hydroxide only "very slowly." If twelve practical people can be persuaded that Stief's theory of the accident

was more plausible than Sexauer's, I fail to understand how a judge could say they had gone beyond the bounds of reason.

Once this is admitted, the plaintiff was entitled to a jury's consideration whether the label was adequate in view of the hazard of the formation of hydrogen as a result of contact with zinc at a high temperature. Sexauer knew that sodium hydroxide involved this hazard, and it is common knowledge both that household plumbing frequently contains galvanized pipe and that galvanized pipe is coated with zinc. Under these circumstances a jury could rationally find that failure to warn of the hazard of utilizing Mule Kick in conjunction with galvanized pipe at a high temperature was negligent; indeed, defendant's witness Springhorn, formerly sales manager and at the time of trial assistant to the president of Sexauer, thought the label in fact contained a warning with respect to zinc, as it did with respect to aluminum. Moreover, the label was not merely deficient in warning against the application of heat, but worse than that; it instructed the user to dissolve Mule Kick in "boiling water" and to "flush with plenty of hot water," and urged that it be used to thaw frozen pipes. Thus, there was not merely a lack of warning with respect to the dangers of contact between a heated solution containing Mule Kick and zinc but a positive indication of lack of danger from heating.

The majority argues against this that there is no evidence of previous experience of Mule Kick having generated sufficient hydrogen gas through contact with galvanized pipes to cause an explosion. Of course, the absence of any evidence to this effect does not mean that no such incident had ever occurred. In any event the jury could find that since the hazard was known, Sexauer was under a duty to warn against it and certainly under a duty not to say things that would invite it. While the majority opinion cites many cases from other courts, it unaccountably neg-

lects to refer to our own decision in *Butler v. L. Sonneborn Sons, Inc.*, 296 F. 2d 623, 626 (2 Cir. 1961), which is about as close in point as one tort case can be to another. There also a manufacturer contended that a long record of accident-free experience justified failure to give a warning. We rejected that contention, saying:

> "But, especially when injury is likely to be serious if trouble occurs, even slight foreseeability may warrant, and a long history of good fortune will not necessarily exclude, a conclusion by the trier of the facts that prudence requires the manufacturer to take on so small an added burden."

Depriving Stief of jury determination of the common sense questions on which his case against Sexauer depends runs wholly counter to the trend of Supreme Court decisions over the past decades.

I concur in the affirmance as to Diamond although not on the ground relied on by the majority. The 400 pound drum in which Diamond sold caustic soda to commercial and industrial buyers for a variety of uses bore a label reprinted in the margin.* Stief's contention is not that this label was inadequate in the sense that it did not inform sexauer of the danger that contact with zinc might result in the formation of hydrogen; since Sexauer knew all about this, any such deficiency in the label would have lacked sufficient causal relation to the accident. The claim is rather that Diamond was bound to see to it that Sexauer's label was adequate. Plaintiff relies heavily on Restatement (Second), Torts § 388 (1965) and particularly on the discussion of "Warnings given to third person" at pp. 307-10.

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* "WARNING: CONTAINS CAUSTIC SODA. Burns skin and eyes. Avoid contact with body or clothing. Do not take internally. When handling wear goggles or face-shield and avoid all skin contact. While making solutions, add Caustic Soda slowly to surface to avoid violent spattering. In case of accidental skin contact, flush affected parts with water and wash with vinegar. For eyes, flush freely with water for at least 15 minutes. Obtain medical attention."

Most of the discussion, however, does not read directly on the instant situation where a manufacturer sells a raw material in large containers to many purchasers for a wide variety of uses and the particular purchaser has repacked it under his own name and label. Perhaps the only observations directly applicable are the scarcely decisive ones that "it is obviously impossible to state in advance any set of rules which will automatically determine in all cases whether one supplying a chattel for the use of others through a third person has satisfied his duty to those who are to use the chattel by informing the third person of the dangerous character of the chattel, or of the precautions which must be exercised in using it in order to make its use safe," and that "modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so." I am far from saying that circumstances could never arise in which a manufacturer like Diamond might be subjected to liability for inadequate labelling by an intermediary like Sexauer, as, for example, if it knew a packager who had purchased significant quantities of its caustic soda was putting this into the market with no warning whatever, or if the packager had submitted and obtained approval for a label that was highly misleading. But the facts here are at the opposite end of the spectrum from these hypotheticals.

Sexauer had been selling Mule Kick for thirty years under the same label but began purchasing caustic soda from Diamond only a little while before the injury to Stief. The record reveals nothing as to how important an outlet Sexauer then became, and there is no evidence that Diamond had seen its catalog or periodical advertising. Although plaintiff claims there is evidence that Diamond had seen the label on the can, the testimony was highly equivocal and surely does not show that Diamond had seen the label before it sold the caustic soda that was repackaged into

the cans used by Stief in January, 1961, or that if it had protested upon seeing the label, the accident would have been avoided. Moreover, although a jury could find the Sexauer label inadequate to discharge the duty of care of a distributor to the plumbing trade, it was not blatantly offensive or insufficient; the degree of foreseeability of danger and hence the amount of care required with respect to warning may vary somewhat inversely with a seller's distance from the specific use and with the number of intermediaries. On the facts here presented, there would have been no rational basis for a jury's concluding that Diamond had failed to exercise reasonable care with respect to the plaintiff.

SUPREME COURT, U. S.

SEP 5 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 455

CLAYTON H. STEIF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.,

and

DIAMOND ALKALI COMPANY,

Respondents.

BRIEF OF RESPONDENT, DIAMOND ALKALI COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1967

No. 455

CLAYTON H. STEIF,

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Statement of Question Presented

There being no proof that respondent, Diamond Alkali Company had knowledge, prior to the accident, of the contents of the label used by respondent, J. A. Sexauer Manufacturing Co., Inc., and accordingly, no issue of fact to be determined by the jury, should this Court grant certiorari to review the unanimous decision, of the Second Circuit, which affirmed a judgment in favor of respondent, Diamond Alkali Company, against petitioner, entered upon the granting of a motion for a direction of a verdict made by respondent at the conclusion of plaintiff's case?

Statement of the Case

This case is one in which plaintiff sued to recover damages for personal injuries. In substance, in the complaint, plaintiff alleged that, in the course of using a product, packaged and sold by J. A. Sexauer Manufacturing Co., Inc., known as "Mule-Kick" and advertised as opening clogged drains, he was burned and permanently blinded by a spray containing "Mule-Kick"* which issued from a hole in the pipe which he was attempting to clear. Breach of warranty and negligence were charged against defendant Diamond Alkali Company.

During the trial the breach of warranty theory was abandoned, and the trial proceeded on a theory of negligence. At the close of the plaintiff's case, the Court granted a motion for a direction of a verdict in favor of this respondent.

Plaintiff's case, as stated in his Appellate Brief:

> " . . . against Diamond Alkali Company is based on Diamond's role in checking Sexauer's label, ["Mule-Kick"] from time to time, and making no suggestions regarding the inadequate warning on that label when Diamond knew of the dangerous properties of the material which Sexauer was selling to an unwarned and unsuspecting public." (Brief p. 8)

Diamond's knowledge of the language used on the can was attempted to be established through the testimony of Mr. Sexauer, an officer of defendant, J. A. Sexauer

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* Petitioner knew of the danger involved in using this product. He said, "I never liked to use this "Mule-Kick" Pipe Cleaner and I was always very careful when I had to use it." (261a)

Manufacturing Co., Inc., who was called by plaintiff as a witness. He testified that the label on the can was prepared long before he took over the job of purchasing, the date of this is not indicated and that the information on the can came from the chemists of the organizations from which Sexauer bought the material at that time (677a, 678a). The witness said also that the information on the label had been checked by Diamond Alkali Company (680a); that Diamond Alkali Company sold caustic soda to Sexauer commencing about 1961;* that before Diamond Alkali Company had any connection with Sexauer, other manufacturers sold caustic soda to it, at least as far back as 1931; that the label and the directions on the can were first used about 1931; that no changes were made in the language used on the can from 1931 to the time of the occurrence (677a-681a).

This testimony establishes that the label and directions, on the can used by Mr. Stief, were identical to those placed on all the cans of "Mule-Kick" sold by Sexauer from about 1931. This was 30 years before Diamond Alkali Company sold caustic soda to Sexauer. The proof of Diamond's knowledge concerning the language of the label, is that the information on the label had been checked by Diamond. (680a). There was no showing when Diamond checked. The record is barren of evidence to establish that this was done prior to the accident.

The evidence, with respect to Diamond's knowledge, deserves the characterization given it by Judge Friendly, as follows:

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*There is no dispute that Diamond Alkali Company sold the caustic soda to J. A. Sexauer Manufacturing Co., Inc., and delivered it, in 400 pound drums, to Sexauer's packager which packaged it in small cans and placed Sexauer's label on it.

"Although plaintiff claims there is evidence that Diamond had seen the label on the can, the testimony was highly equivocal and surely does not show that Diamond had seen the label before it sold the caustic soda that was repackaged into the cans used by Stief in January, 1961, or that if it had protested upon seeing the label, the accident would have been avoided. . . . On the facts here presented, there would have been no rational basis for a jury's concluding that Diamond had failed to exercise reasonable care with respect to the plaintiff." (P. 1874 of Unofficial Report)

There is no evidence at all to support petitioner's claim that Diamond "knew before this accident that Sexauer's label did not warn of spattering and held forth false assurances of safety therefrom and did nothing about it." (P. 10 of the Petition) This charge is made at two places on Page 10 and repeated twice on Page 11 of the Petition. It is made again at Page 13.

The Affirmance by the Court of Appeals

The opinion of the Court of Appeals, with respect to the claim against Diamond is found at Pages 1867, 1868 and 1872 through 1874 of the unofficial report of the case.

"The gist of Stief's argument is that, assuming that Diamond knew the nature of Sexauer's Mule-Kick label, Diamond should have insisted upon, or exerted some power or pressure upon Sexauer to provide, a label which would have avoided this accident. However, as in the case of the Sexauer label, since the cause of the accident is unknown, what could Diamond have suggested be added to the label even assuming such a policing power?

"Since on the facts here presented, there would have been no rational basis for a jury's conclusion that the accident was caused by an inadequate label, the trial court correctly dismissed the case against Diamond.

"Judgment dismissing the complaint against Sexauer and Diamond affirmed. No costs."

This determination, found in the prevailing opinion, was supported by the language of the dissenting opinion, Friendly, Circuit Judge, who concurred as to Diamond. His concurrence is found at Pages 1872 to 1874, inclusive, of the unofficial report. In substance, Judge Friendly held that Diamond sold caustic soda to commercial and industrial buyers in 400 pound drums which were labelled appropriately.*

He said, also, that regardless of the possible obligation of a manufacturer which sells raw material in large containers to many purchasers to repack under their own name and labels, the testimony, on trial, failed to establish that Diamond had any knowledge of the language of the label prior to the accident which resulted in plaintiff's injuries. Judge Friendly's opinion was: "On the facts here presented, there would have been no rational basis for a jury's concluding that Diamond had failed to exercise reasonable care with respect to the plaintiff." (Page 1874)

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* "WARNING: CONTAINS CAUSTIC SODA. Burns skin and eyes. Avoid contact with body or clothing. Do not take internally. When handling wear goggles or face-shield and avoid all skin contact. While making solutions, add Caustic Soda slowly to surface to avoid violent spattering. In case of accidental skin contact, flush affected parts with water and wash with vinegar. For eyes, flush freely with water for at least 15 minutes. Obtain medical attention."

The Power of the Court to Direct a Verdict, for Insufficiency of Evidence, Presents no Novel Question

Baltimore & Carolina Line, Inc. v. *Redman,* 295 U.S. 654
G. E. Herron v. *Southern Pacific Co.,* 283 U.S. 91
Neeley v. *Eby Construction Co.,* 386 U.S. 317
Lavender v. *Kurn,* 327 U.S. 645

The authority of the courts to direct a verdict in favor of defendant, when the evidence is insufficient to sustain a verdict for plaintiff, was recognized in *Baltimore & Carolina Line, Inc.* v. *Redman, supra.* In this case the court stated that the right to reserve decision and to subsequently direct judgment for one party, when the jury returned a verdict for the other, was part of the common law prior to the adoption of the Seventh Amendment. The right of trial by jury protected by the Amendment is to be considered in the light of the existence of such common law. The Supreme Court affirmed a reversal by the Court of Appeals because, as a matter of law, the evidence was insufficient to sustain a verdict for plaintiff. It was held further that the judgment of the Court of Appeals should embody a direction for a judgment of dismissal on the merits which would be the equivalent of a judgment for defendant on a verdict directed in its favor.

In *G. E. Herron* v. *Southern Pacific Co., supra,* the Constitution of the State of Arizona provided that the defense of contributory negligence or of assumption of risk was, in all cases, to be left to the jury. Nevertheless, in this diversity case, it was held that the direction of a verdict in favor of defendant was proper since the evidence of

contributory negligence or assumption of risk was conclusive and the question was one of law so that the court had the right and duty to direct a verdict for defendant. *Herron* was not a Federal Employers Liability Act case.

In a most recent decision, *Neeley* v. *Eby Construction Co., supra,* the Court of Appeals held that the evidence was insufficient to establish either respondent's negligence or proximate cause and reversed the judgment of the District Court with instructions to dismiss the action. On appeal, it was held that Appellate Courts are not barred by the Seventh Amendment's right of jury trial from granting a judgment n.o.v., the Supreme Court, at Page 322, used the following language:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v."

Lavender v. *Kurn, supra,* was a Federal Employers Liability Act case. There, it was held that the right to trial by jury in such cases was a substantial part of the cause of action and a judgment of an appellate court setting aside a verdict for the plaintiff could not be sustained unless there was a complete absence of probative facts to support the conclusion of the jury.

The question left undecided in *Byrd** is not involved herein.

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* *Byrd* v. *Blue Ridge Cooperative,* 356 U.S. 525, Page 537, Footnote: "Our conclusion makes unnecessary the consideration—and we intimate no view upon—the constitutional question whether

Comment on the Restatement (Second) of Torts, § 388 (1965)

A reading of the language of the restatement indicates that it is not intended to apply to a situation in which a manufacturer sells raw material in large containers to many purchasers for a wide variety of uses, and the particular purchaser has repacked it under his own name and label. This is the opinion of Circuit Judge Friendly, Page 1873, Unofficial Report. His conclusion, found therein, is worth repeating:

> "I am far from saying that circumstances could never arise in which a manufacturer like Diamond might be subjected to liability for inadequate labelling by an intermediary like Sexauer, as, for example, if it knew a packager who had purchased significant quantities of its caustic soda was putting this into the market with no warning whatever, or if the packager had submitted and obtained approval for a label that was highly misleading. But the facts here are at the opposite end of the spectrum from these hypotheticals."

Inaccuracies in Petition

1. At Page 5 of the Petition, in a footnote, it is claimed that the Court erroneously excluded the label used by Diamond. The language is:

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the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action."

"But despite the manifest relevance of that evidence as against both defendants, the learned Trial Judge erroneously excluded that label and its proof from the case and withheld it from the jury."

In support of this statement, reference is made to Page 700a of the record. Page 700a does not refer to the offer. Moreover, the evidence was accepted, against Diamond, at Page 601a.

2. At Page 6 of the Petition, it is maintained that Diamond's label on its drums makes clear there is no question that this Caustic Soda, when put into solution, would "violent[ly] spatter." Diamond's label does not make this clear. In fact, the directions on the label are calculated to avoid spattering, "while making solutions, add caustic soda slowly to surface to avoid violent spattering." When petitioner put the caustic soda in water, there was no spattering because he followed the directions. It is not correct that the language on the label established that "Diamond had actual notice that this product would explode and spray violently" as is set forth on Page 6 of the Petition.

3. On Page 10 and Page 11, petitioner maintained that Diamond had knowledge of the deficient label of Sexauer. The language used indicates that petitioner's position is that Diamond had this knowledge prior to the accident. There is no proof, at all to support this contention, and it is not correct.

4. On Page 14, it is claimed that the Court of Appeals was in error, in ruling two to one, that the petitioner had not proved a prima facie case against both respondents. The entire court was unanimous in affirming the judgment

in favor of respondent Diamond. Circuit Judge Friendly dissented as to Sexauer, and concurred as to Diamond.

5. The footnote, at Page 17 of the Petition, states: "The record contains clear proof that Diamond knew that Sexauer had deleted vital warnings from the label." If this language is to have any meaning, in this case, it must be read as a statement of fact to the effect that Diamond knew, prior to the occurrence, that Sexauer had deleted vital warnings from the label. This is not correct.

CONCLUSION

The direction of a verdict, in favor of respondent Diamond Alkali Company, did not deprive plaintiff of a jury trial, unconstitutionally, and the affirmance of the judgment entered thereon was proper. The petition for a Writ of Certiorari should be denied.

Dated: New York, New York
August 30th, 1967

Respectfully submitted,

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Introductory

Petitioner had appealed to United States Court of Appeals for the Second Circuit from a judgment dismissing his personal injury action after trial before the Hon. THOMAS F. CROAKE and a jury in the United States District Court for the Southern District of New York. The Court of Appeals affirmed.

Petitioner had been injured as a result of an alleged explosion resulting from use of a drain pipe cleaning product, "Mule-Kick" packaged and marketed by the respondent J. A. Sexauer Mfg. Co., Inc. and manufactured by the respondent, Diamond Alkali Company. The accident occurred in Pennsylvania and, concededly, Pennsylvania law controls (399a). Under Pennsylvania law, a warranty action is not maintainable under the circumstances here present (399a). The only question was whether petitioner had established a *prima facie* case in negligence.

Petitioner claimed that the day after he deposited a second can of "Mule-Kick" into a clogged drain at a home in Lancaster, Pa., an "explosion" occurred in the pipe, forcing out a metal plug in a clean-out opening thereof, following which a spray of sodium hydroxide solution issued from the opening striking petitioner some eight or ten feet away, causing him to sustain burns.

The chief ingredient of "Mule-Kick", as it is of all drain cleaners, is sodium hydroxide or lye. Admittedly sodium hydroxide has no explosive characteristics (737a-738a).

The cause of the "explosion" of this non-explosive material was alleged to be hydrogen formed by the reaction of the sodium hydroxide with zinc. Admittedly, there was no zinc in "Mule-Kick" (792a). It was claimed that zinc was present in the material that was clogging the pipe.

In addition to the admission that "Mule-Kick" did not have hydrogen producing adulterants, either zinc, or any other, it was also undisputed that the sodium hydroxide in "Mule-Kick" was commercially pure (622a), and it was conceded that the product was well fit for its intended use (817a). Of necessity, the various claims of negligence with respect to the manufacture of the product and the use of dangerous substances therein had to be abandoned. The only claim of negligence urged is that stated at pages 10-11 of the petition, viz., alleged deficiencies in the label placed on the can of "Mule-Kick".

Questions Presented

Petitioner concedes (p. 17) that there may be such a deficiency in proof, that a defendant is entitled to a directed verdict. This Court has held, in *Neely* v. *Martin K. Eby,* 87 S. Ct. 1072 (1967), that the Seventh Amendment is not violated when a Court of Appeals holds that there is insufficient evidence to present to a jury with respect to the issues of negligence and proximate cause.

Accordingly, the question which petitioner says was left open in *Byrd* v. *Blue Ridge Elect. Cooperative,* 356 U. S. 525, has been answered. The only question is, therefore, whether the Court of Appeals, in affirming the District Court's dismissal of the complaint, had properly applied pertinent Pennsylvania law to the proof that was adduced.

The applicable Pennsylvania law is:

> "But beyond this generality, every case must turn upon a determination of what will be reasonable behavior by the defendant considering his actual or imputed knowledge, both of the danger and the need to warn or otherwise protect users against that danger."
>
> *Hopkins* v. *E. I. Du Pont de Nemours & Co.,* 212 F. 2d 623, 625 (3rd Cir.).

> "In this situation the law of Pennsylvania is clear. It starts with the general proposition that the plaintiff bears the burden of proving that negligent conduct of the defendant was the proximate cause of plaintiff's injury. Erbe v. Philadelphia Rapid Transit Co., 1917, 256 Pa. 567, 100 A. 966; Sandt v. North Wales Foundry Co., 1906, 214 Pa. 215, 63 A. 596. But where plaintiff's evidence supports an inference that excludes liability of the defendant just as strongly as an inference that comprehends liability, a jury would have to engage in speculation and conjecture in order to attribute the accident to one rather than the other.

Dangelo v. Pennsylvania R. Co., 1930, 301 Pa. 579, 152 A. 743. Where plaintiff thus leaves the jury to guess as between suggested causes, there can be no recovery. Fix v. Pennsylvania Power & Light Co., 1943, 346 Pa. 598, 31 A.2d 114; Houston v. Republican Athletic Ass'n, 1941, 343 Pa. 218, 22 A.2d 715; Anderson v. Reading Co., 1932, 306 Pa. 246, 159 A. 450; Gausman v. R. T. Pearson Co., 1925, 284 Pa. 348, 131 A. 247."

Hopkins v. *E. I. Du Pont de Nemours & Co.*, 212 F. 2d 623, 626 (3rd Cir.).

Statement of the Case

On January 25, 1961, petitioner, a full fledged licensed plumber (235a-238a), experienced in freeing clogged drains (238a) was directed by his employer, together with a fellow employee, Nixdorf, an equally experienced plumber (238a, 403a), to 5 Locust Street, a two-family house in Lancaster, Pa., to repair a clogged drain in the kitchen sink of the second floor apartment (207a, 208a).

Manipulation of a plunger proving ineffectual (209a-210a) the men decided to use "Mule-Kick" which petitioner had used before and always kept on the truck for use when mechanical means of clearing a stopped drain proved ineffectual (212a, 243a-244a, 246a-248a). It was the only kind of drain cleaner preparation he used (247a).

"Mule-Kick" is essentially sodium hydroxide or caustic soda, i.e., lye (728). Caustic soda has been used commercially in drain cleaning preparations for the past 40 years or more (907a-908a). It is the basic constituent of all drain cleaners (906a). Concededly, sodium hydroxide has no explosive characteristics (737a-738a). When dissolved in water it does not give off any gases (908a). It plays a role in the production of hydrogen when reacting with aluminum or zinc (636a-637a). Admittedly there was no zinc in "Mule-Kick" (792a).

The cleaning properties of sodium hydroxide arise out of the fact that when it combines with the grease that is usually present in a stopped up drain it forms ordinary soap, readily soluble in water (908a-909a).

Petitioner had read the label on "Mule-Kick" many times (273a, 658a), and was fully aware that burns could be caused by contact with it, he always used "Mule-Kick" carefully to make sure that there was no splattering, no contact with the hands or face (243a, 264a, 265a, 266a, 271a, 277a, 278a, 279a). It was common knowledge among plumbers to avoid contact with it because it, as well as any other drain cleaner, could cause a bad burn (447a, 448a, 503a).

Petitioner on this occasion again read and followed the instructions on the label (273a-276a). He and Nixdorf removed the water from the drain (210a), poured the contents of a can of "Mule-Kick" into boiling water in two batches, stirring until the "Mule-Kick" was dissolved, emptied the solution into the drain, and left the premises (213a, 214a). Nixdorf cautioned the tenants not to get their hands into the solution because they might get burned (502a).

On the next day, January 26th, petitioner returned alone, Nixdorf had been despatched to another job (214a). The drain was still stopped up (215a). Following the same procedures as before, petitioner used a second can of "Mule-Kick" and once more left the premises (215a, 216a).

When petitioner returned on January 27th, the sink was still clogged (216a, 218a). It became necessary to trace the line in order to determine just where the stoppage was located. This required removal of flooring wherever it covered the pipes (216a). Exposure of the pipes under the flooring of the second floor disclosed that the pipe was filled with liquid at that point (218a). Petitioner thereupon went to the first floor apartment and traced the drain pipe to a wall in the pantry off the kitchen (219a). He

removed the flooring there and saw a section of pipe with a metal plug covering a clean-out opening in it (219a, 220a). The pipe was roughly 17 inches long (910a), about 1½ inches in diameter (300a). It had a two-inch galvanized elbow at its top (721a, 911a). The clean-out opening was 2½ inches below the lower end of the galvanized elbow (911a).

Petitioner removed the plug, there was no seepage there (220a). This led him to the conclusion that the stoppage was above, somewheres between the first and second floors (271a, 304a, 311a, 321a, 346a). He testified that when he removed the plug, he saw a small forming of ice (221a), and that it was not the cause of the clogging of the drain (323a-324a). This forming of ice was in the pipe 6 or 8 inches above the clean-out hole (331a-333a, 342a). Obviously, the stoppage was located above the galvanized elbow the upper edge of which was four inches above the clean-out opening (911a). He replaced the plug, tightening it by hand (224a, 321a), "finger tight" (337a). Note Nixdorf's testimony that the threads of the cut-out opening was degenerated (470a), there were no threads (539a). Although there was only a "small forming" of ice, petitioner went to his truck and fetched a Prestolite torch, which emits heat of 3500° Fahrenheit (776a), because, he figured that while he was there, he "might as well get rid of this small forming of ice to eliminate future trouble" (222a).

This claim of a small forming of ice unrelated to the clogging of the drain was new-born in the litigation. On March 3rd, 1961, a few months after the accident, before any suit was initiated, petitioner, when interviewed by an investigator for the Workmen's Compensation carrier, made the following written statement (Defendant's Exhibit A, 339a):

> "After the plug was removed, I could see that there was ice blockage that was causing the trouble. I replaced the plug and used a torch to heat the drain pipe under the floor, where the ice blockage was located."

The pipe was located in an outside wall (303a-304a) and it is to be noted that the temperatures on January 21st ranged from —8° to 21°; on January 22nd from —13° to 19°; on January 23rd from —9° to 21°; on January 24th from —7° to 21°; on January 25th from —1° to 18°; on January 26th from —1° to 16° and on January 27th from —20° to 1° (843a-844a).

The need for petitioner's change of position with respect to the presence of ice and its effects becomes apparent when we analyze the expert evidence.

After petitioner applied heat to various parts of the pipe, he took a snake to the second floor and ran it through the lines (222a, 343a). Nothing happened, the water remained (222a). As he was manipulating the snake, he could see the mixture inside the pipe (347a). There was no spraying, no bubbling, no signs of pressure, no evidence of escaping gases, no propulsion upward of any fluid (347a-349a).

Petitioner did not know what to do next and went back to the first floor (223a). He stationed himself at the pantry door some distance away from the pipe he had heated, contemplating his next move, when he heard a noise like a firecracker and was then hit by a spray of sodium hydroxide solution issuing from the clean-out opening (223a).

Petitioner's theory of the accident, advanced through a chemist, Dr. Willard, was that the pipe had been clogged at the galvanized elbow; that the clogging material contained zinc; that the sodium hydroxide of the "Mule-Kick," combined with this zinc to liberate hydrogen, that the hydrogen forced the plug out of the clean-out opening causing the sodium hydroxide solution to spray out (712a, 720a, 727a, 729a-731a, 791a).

POINT I

Assuming the accident happened as claimed, the courts below correctly ruled that there was no issue as to negligent deficiencies in labelling.

The alleged failure to warn against possible explosions. (Petition, p. 11)

There was no proof of an "explosion". The claims of "explosion" comes only from petitioner's counsel. The expert, Dr. Willard, never said there had been an explosion. She claimed that the plug had been forced by the "pressure" of hydrogen forming and trapped between the clogging material and the sodium hydroxide solution above (729a-731a). In any event, the statement that the label should have warned of a possible explosion is a meaningless generality, as was pointed out in *Hopkins* v. *E. I. DuPont de Nemours & Co.* (3rd Circuit), 212 Fed. 2d 623, when it discussed *Maize* v. *Atlantic Refining Company,* 352 Pa. 51, so strenuously relied upon by petitioner. We quote again (p. 625):

> "But beyond this generality, every case must turn upon a determination of what will be reasonable behavior by the defendant considering his actual or imputed knowledge, both of the danger and the need to warn or otherwise protect users against that danger."

Prosser, Torts, 2d Edition, page 121 summarizes the problem:

> "A risk is a danger which is apparent, or should be apparent, to one in the position of the actor. The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the event.' The standard must be *one of conduct, rather than of consequences* . . . The court must put itself in the actor's place." (Emphasis supplied)

Since sodium hydroxide admittedly has no explosive characteristics, the issue is the foreseeability of explosion by contact with other materials, specifically by formation of hydrogen, the purported explosive agent in this case.

The presence of zinc is the alleged cause for the formation of hydrogen. Aluminum concededly was not present anywhere (804a, 806a). The issue is, therefore, not whether it was known to Sexauer as a general proposition of chemistry that sodium hydroxide in combination with zinc would liberate hydrogen but whether it knew or should have foreseen and warned against that chemical possibility under the circumstances of this case. This requires an examination of the source of the zinc which purportedly combined with "Mule-Kick" to liberate hydrogen.

It was petitioner's claim that the material that clogged the drain contained all sorts of waste matter, including 1.2% of zinc (715a-720a, 794a) which reacted with "Mule-Kick" to produce hydrogen (729a-731a, 791a).

It is "Mule-Kick's" reaction with this zinc, adventitously present in the stoppage material clogging the drain and discoverable only by microscopic examination, that petitioner contends respondent Sexauer should have warned about on the label.

The record makes clear the complete unreasonableness of this contention.

There was no proof of the frequency with which clogging material in drainpipes contained zinc elements.

There was no proof that clogging material in drainpipes usually contains zinc elements.

Sodium hydroxide has been used as an ingredient of drain cleaning preparations for forty years (907a). All drain cleaning preparations have sodium hydroxide (906a). One would think that if there were a foreseeable hazard of explosion or dangerous pressures resulting from the formation of hydrogen caused by a reaction of sodium hy-

droxide with zinc-containing clogging material there would be some prior similar incidents. No such proof was made, or even attempted.

The proof was that in the 5 years prior to 1960, 3,800,000 cans of "Mule-Kick" have been manufactured and used (1038a). There is no suggestion that during those years there had been so much as one complaint of any such incident as here allegedly occurred.

Why, in all reason, should a warning be given of the hazards of an explosion or dangerous pressures caused by the liberation of hydrogen induced by the reaction of sodium hydroxide with zinc elements fortuitously present in material clogging a drain when, in all the years of practical experience no such incident was ever heard of?

> "When a manufacturer has used a particular design for along time or on an extensive scale without mishap, this would seem an important indication that no unreasonable risk is created by continued distribution of a product of a particular design."
>
> Noel, Manufacturer's Negligence of Design or Directions for Use of a Product (71 Yale Law Journal 816 at p. 830).

The accident in this case, even if occurring as petitioner claimed, which we do not concede at all, exemplifies the truism expressed by the Court in *Schfranek* v. *Benjamin Moore & Co.*, 54 Fed. 2nd 76, 77 (DCSDNY):

> "The zone of the possible in casualties is practically limitless.
>
> "Almost anything in the way of an accident is possible. Fully to realize such possibilities usually requires much reflection after the event.
>
> "The zone of the probable, however, is very much narrower, and that is the zone with which tort liability is concerned, and a survey of it involves the exercise of reasonabde foresight only."

The presence of zinc elements in clogging material in a drainpipe, let alone in quantities sufficient to create an explosive amount of hydrogen, is so remote, so far-fetched, so unusual, so outlandish, that there can be no factual basis for a jury to say that such a hazard was reasonably expectable so as to require warning,

> "[W]here there might be only a remote possibility of danger, failure to warn is not negligence."
>
> *Bish* v. *Employers Liability Assurance Corp.* (5th Cir.), 236 Fed. 2d 62, 69.

In *Kaempfe* v. *Lehn & Fink Prods.*, 21 App. Div. 2d 197, it was said at page 200:

> "On the other hand, it is clear that the manufacturer or seller should not be held bound to anticipate and warn against a remote possibility of injury in an isolated and unusual case. The law requires a person to exercise reasonable care to guard against probabilities, not mere remote possibilities. A supplier of a product in daily use ought not to be placed in the position of an insurer.'

In *Boyd* v. *American Can Company*, 249 A. D. 644, affd. 274 N. Y. 526, it was pointed out that a manufacturer "may not be charged with negligence where some unusual result occurs that cannot reasonably be foreseen and is not within the compass of reasonable probability. It is not enough that in the intended use injury is possible."

The point is pithily summed up by the Court in *Jamieson* v. *Woodward & Lathrop*, 247 Fed. 2d 23, 29 (USCADC), cert. denied 355 U. S. 55:

> "Reasonable foreseeable in the rule here applicable does not encompass the far reaches of pessimistic imagination."

We assume that the purpose of the warning contended for is to deter persons from using "Mule-Kick" when there is zinc in the material clogging the drain pipe. This would require knowledge of the ingredients of the clogging material. How does petitioner propose that this knowledge be acquired? To determine the presence of zinc in clogging material by microscope or otherwise, would require the removal of the clogging material for examination. If that can be done, then there is no need for "Mule-Kick" or any other similar drain cleaning product. The very purpose of "Mule-Kick" and other like products is to cope with clogging material that cannot be effectively handled by mechanical means. Surely petitioner does not suggest that if a pipe is clogged by waste material that cannot be removed by mechanical means, no drain cleaning preparations should be used, because perchance, the stoppage might contain zinc elements which could combine with sodium hydroxide to liberate hydrogen. That is the plain implication of the suggested warning. The suggested warning is so divorced from practical reality as to demonstrate its lack of reasonableness. As has been said, in the striving for safety one is not required to go beyond the bounds of what is practicable and reasonable. (*Beauchamp* v. *N. Y. C. Housing Authority,* 12 N. Y. 2d 400, 407.)

Dr. Willard had made it clear that the source of the zinc that she was opining about was in the clogging material, which may or may not have come from the galvanized elbow (796a-807a). Apart from that there was no evidence to establish the need for a warning that the passage of "Mule-Kick" through a galvanized elbow created a danger of forming hydrogen in dangerous quantities. The only evidence remotely relevant to that claim was given by Nixdorf, a fellow worker of the plaintiff, an experienced plumber (238a, 403a). He testified that in all his years of plumbing experience and as a trouble shooter, he had used "Mule-Kick" on *all* types of pipes, he never intimated that he had experienced any difficulty (502a).

Plaintiff, a similarly experienced plumber, said nothing about any observations made in the years that he plied his trade of cleaning clogged pipes that as much as hinted at anything untoward occurring when "Mule-Kick" was poured into galvanized pipes.

Neither from the body of scientific knowledge or from the history of the use of drain cleaners, was there any intimation of a known or experienced danger from gases related to classification of drain pipes and, hence, to be warned against.

Here, too, the duty contended for, to be meaningful, would require that every time there was a clogged drain problem that could not be resolved by mechanical means, the floors and walls of the building would have to be ripped apart, as was done in this case, to determine whether, by chance, the section of the drainage system where the stoppage occurred utilized galvanized pipe.

We submit, accordingly, that the alleged hazard of hydrogen forming by the reaction of "Mule-Kick" with a galvanized pipe was so remote, so distant, so unlikely, that there could be no rational basis for a determination that there was a need to warn against it.

Apart from the above, the proof is clear that the galvanized elbow could not possibly have played a role in the alleged production of hydrogen. As pointed out earlier, petitioner saw ice forming 6 or 8 inches above the clean-out opening, meaning that the stoppage material, if acting as claimed, was above the galvanized elbow which ended four inches above the clean-out opening.

How it is possible for the zinc of the galvanized elbow to travel *upwards,* through the air tight stoppage, in order to combine with the sodium hydroxide resting on the stoppage material was never explained. It cannot be explained.

The claim that the label was misleading in its statement that there was no disguised perfumes, no dangerous bubbling adulterants, causing injurious spray, explosive gases and harmful fumes. (Petition, p. 11)

This claim is an exercise in reckless averment.

The adulterants which can cause bubbling and the formation of explosive gases are zinc and aluminum.

Dr. Willard, who analyzed "Mule-Kick" on behalf of petitioner admitted that "Mule-Kick" had no zinc adulterant (792a).

Dr. Willard never claimed that "Mule-Kick" had any aluminum adulterant. Dr. Snell testified that it did not (907a). His testimony was undisputed.

Dr. Willard conceded that "Mule-Kick" was a product well fit for its intended purpose (817a). She made no claim that the sodium hydroxide in it was impure (817a). The proof that it was commercially pure (622a) was undisputed.

Petitioner and his fellow worker, Nixford, had used "Mule-Kick" many times before. Neither claimed that on any occasion it had ever been observed to bubble, to spray, to emit gases or fumes of any kind.

In the face of the above concessions, admissions and undisputed proof, it would be impossible for a jury to find that there was any misstatement in the label when it set forth that "Mule-Kick" contained "no disguised perfumes, no dangerous bubbling adulterants, causing injurious spray, explosive gases or harmful fumes." If there were such a finding by a jury it would be in plain and impermissible disregard of all the evidence in the case.

The claim that the label was misleading because the word "safe" was used. (Petition, p. 10)

This claim demonstrates the fallacy and vice of urging a contention on the basis of a word taken out of context.

Any fair reading of the writing on the can makes it apparent that there was no representation that here was a product that was totally harmless under all circumstances. It had the legend "poison"; it contained cautions to keep away from face and hands. It advised of antidotes to caustic burns, external and internal, with specific reference to the eyes. No one who could read could possibly be misled into believing that he was using a bland, innocuous product, harmless no matter how used.

It is clear that the word "safe", when read in context, referred to the fact that it had no disguised perfumes, no dangerous bubbling adulterants, causing injurious spray, explosive gases or harmful fumes. We have demonstrated that the product was exactly as labelled, that it had none of these hazards.

Nothing demonstrates more cogently that "Mule-Kick" was a safe drain pipe cleaning product, as labelled, than its prior use by petitioner. He had used "Mule-Kick" many times before. It was a standard item he always kept on his truck for use when mechanical means of freeing drains proved ineffective. It was the only drain cleaner he used (212a, 243a-247a).

When petitioner used "Mule-Kick" carefully, as directed it never caused him any harm (264a, 659a-660). In other words, as was testified to by all, when used properly it was a safe draing cleaning product (264a, 449a, 1027a). That is all that the label said it was. True if misused, as by spilling or splattering over the hands, or on the face, or the body, harm could come. But harm can come from use or misuse of anything. Because a hammer can mash a thumb, or a

knife can cut a hand, or a stove burn a finger does not make the hammer or knife or stove unsafe.

There is not so much as an intimation that in all of petitioner's prior use of "Mule-Kick", there has ever been a bubbling or spraying, or formation of gases, explosive or otherwise, or the production of mumes of any kind. If there had been, surely petitioner wolud have worn the goggles that his employer had furnished him to use when working with "Mule-Kick" (547a-549a). He never used them (247a), clearly demonstrating that there was no known hazard of bubbling, spraying, gases or fumes inherent in "Mule-Kick". At all times the product was as labelled, a safe drain cleaner, containing no disguised perfumes, dangerous bubbling adulterants, causing injurious spray, explosive gases or harmful fumes. There is no evidence which would permit a jury to find that "Mule-Kick" was not as safe as the label said it was.

The claim of negligence in labelling because the words "lye"—"or caustic soda" were not used. (Petition, p. 10)

The label stated that the product contained sodium hydroxide. This, argues the petitioner, was not enough. The description, he urges, should have used the words "lye" or "caustic soda." Apart from the fact that there is no evidence that such a labelling was required by any statute, rule, regulation, usage or custom, the claim of negligence in that regard is a meaningless abstraction. Since sodium hydroxide (lye) has no explosive characteristics, we assume that the gravamen of the claim that the words "lye" or "caustic soda" should have been used is to caution users against the possibility of burns to the end that uers could take appropriate action to avoid possibility of injury of that nature.

That caution was present in no uncertain language. The label contained the warning "Poison". The label warned the user that if there was contact with "Mule-Kick", to

call a physician. It told the user of the possibility of caustic burns and advised what antidotes to use for such burns, whether internal and external, with specific reference to the eyes. How much more information would petitioner have had about the hazards of burns were the words "lye" or "caustic soda," substituted for the words sodium hydroxide?

The purpose of warnings is to give the user information that would afford him the opportunity to shape his conduct, to take such a course of action as may be needed to avoid the possibility of harm. Petitioner had the needed information from the label and, what is more, acted on the information, and when he did it, he came to no harm (264a, 658a-659a).

He had read the label many times (273a, 275a, 658a), and knew that he should be careful to keep "Mule-Kick" away from his hands and face (277a). He knew of the hazards of burns (276a).

As a result of his reading the cautions on the can he used "special care" in pouring the "Mule-Kick" into water (264a-265a). He was always careful not to get the mixture on his hands (264a, 271a, 277a, 279a, 286a). He was always careful to keep the contents of the can or any part of them away from his face (265a, 271a, 277a, 279a). He was careful not to have the contents splatter over him (266a).

His conduct could not possibly have been any different had the words "lye", or "caustic soda" appeared on the label. He was a trained, experienced, licensed plumber (206a, 208a). It is inconceivable that the presence of the words "lye", or "caustic soda", would have deterred him in the slightest from using the product.

There is no suggestion in the record as to what more he could or would have done had the words "lye" or "caustic soda" been substituted for "sodium hydroxide". Clearly,

had the words "lye" or "caustic soda" been on the label, he would not have done things any differently than he had done in the past, or on this occasion, to wit, used special care in pouring, used care to avoid contact with his hand and face, used care to avoid splattering. The presence of the words "lye" or "caustic soda" would not have altered his conduct in the slightest. The absence of the words "lye" or "caustic soda" was, at most to use Pollock's phrase, "negligence in the air", that was not the proximate cause of anything that occurred (*Martin* v. *Herzog*, 228 N. Y. 164, 170).

It follows, therefore, that there was no possible factual basis for a jury to say that had the words "lye" or "caustic soda" been present on the label, what occurred would not have occurred, and hence that the failure to use those words was actionably negligent.

The claim that there was no warning of the danger of splattering. (Petition, p. 11)

Here, again, is argument in the abstract, divorced from the facts. Splattering might occur when a solution is prepared (700A). The way to avoid splattering when a solution is prepared is to pour the caustic soda slowly (700A). That is precisely what the label on "Mule-Kick" advised the user to do—"Pour contents of can into pail SLOWLY, stirring with stick." "Pour solution slowly down drain" (Petition p. 6). As narrated earlier, that is precisely what petitioner did on all the occasions that he used "Mule-Kick", that was how he avoided splattering (264a-266a, 271a, 277a, 279a, 286a).

Since petitioner did exactly as he was advised to do by the label with respect to avoiding the hazards of splattering and since the label told him and warned him of the need to avoid splattering, just what is it that petitioner claims is the connection between the language of the label and what happened to petitioner? There is none.

But apart from that, the accident did not happen when the solution was being prepared, the time when splattering might occur. At the time of the accident, petitioner was not using or preparing a solution of "Mule-Kick". At the time of the accident he was not doing any drain cleaning work at all, he was standing a distance away from the pipe, contemplating what to do next. Preparation of the solution, with the attendant possibility of splattering, had been completed the day before. If by happenstance, a tenant, a visitor or anyone else were to pass by in that room at the time when the "Mule-Kick" was not being used or handled or prepared, it could not be contended that such individuals should have been warned about a splattering that could occur only when the solution was prepared for use. Petitioner's situation at the time of the accident was no different.

Once again, there was no duty to warn petitioner of what he obviously already knew. In any event, the alleged absence of warning had absolutely no proximate relation to what occurred.

POINT II

The authorities relied on by petitioner.

In *Maize* v. *Atlantic Refining Company*, 352 Pa. 51, the warning was in lettering much smaller than that of the other writing on the label. That fact, joined with the name of the product printed in large letters "Safety-Kleen", was held to constitute a negligent and misleading labeling.

Pease v. *Sinclair Refining Co.*, 104 Fed. 2nd 183 (CA 2), dealt with an outright mislabeling, a bottle containing water was marked as containing kerosene. Patently, that is not this case.

POINT III

There was no competent proof that the accident happened as claimed.

The hazard which petitioner says he should have been warned against was the possibility of an "explosion" caused by hydrogen forming by the reaction of "Mule-Kick" with zinc present in the stoppage material. Patently, if petitioner failed to prove such an accident, he has not proved his case.

We urge that petitioner has not made any competent proof of his claim and that the dismissal of the complaint was, therefore, necessary.

The necessary factual premise for the opinion by petitioner's expert was not established

Petitioner's case rested on the testimony of the expert, Dr. Willard, to the effect that there was zinc-containing stoppage material in the galvanized elbow above the clean-out opening, that the "Mule-Kick" had reacted with the zinc in the stoppage material to form hydrogen which ultimately forced out the sodium hydroxide solution through the clean-out opening with resultant spraying on the petitioner. Whether the plug was forced by "explosion" of hydrogen as petitioner's counsel says, or by the pressure of hydrogen, as petitioner's expert claimed, for this theory to have validity, it was essential to establish that the zinc-containing stoppage material was present in the galvanized elbow where allegedly the hydrogen was liberated. There was no such proof.

Almost three years after the accident, Dr. Willard was given the section of pipe containing the clean-out opening from which the sodium hydroxide solution had issued (706a-707a). At the bottom of this pipe, well below the clean-out opening, Dr. Willard found solid, dried up material (706a-707a, 710a) which, upon microscopic analysis,

disclosed, among other matter, the presence of 1.2% zinc (715a-720a, 794a). It was this zinc she claimed that reacted with the "Mule-Kick" to produce the hydrogen (729a-731a, 791a).

There was no aluminum there that could produce hydrogen (804a, 806a).

Voir dire of Dr. Willard elicited that she "assumed" that the zinc-containing stoppage material had prior to the accident, been above the clean-out opening (712a). Obviously she had to assume that it was in the galvanized elbow otherwise there would be no zinc with which "Mule-Kick" (727a, 791a, 829a) could come in contact with and react to produce hydrogen. When objection was taken to her expressing opinions based on that assumption (712a-714a), counsel for petitioner assured the Court that "this will be tied in" (714a). The tieing in was never made. Accordingly, the major premise for Dr. Willard's opinion that the "Mule-Kick" reacted with zinc in the clogging material in the elbow to produce the hydrogen asserted to be the cause of the accident was never established. Her opinion that "Mule-Kick" reacted with zinc present in the clogging material in the galavanized elbow was without any factual foundation whatever and her opinion was without any probative force.

An expert's opinion has no greater force than the grounds on which his testimony shows that it is based (*Riehl* v. *Town of Amherst,* 308 N. Y. 212, 216; *Quinones* v. *St. Vincent's Hospital,* 20 App. Div. 2d 690, affd. 16 N. Y. 2d 572).

There being no factual basis to support the major premise of the hypothetical question posed to the expert, her answer to the question should have been stricken as of no evidentiary value (*Ordner* v. *Reimold,* 278 Fed. 2d 532, 535 (10th Circuit); *Henkel* v. *Varner,* 138 Fed. 2d 934, 935 (U.S.C.A., Dist. of Columbia).

Petitioner's counsel argued that since the zinc-containing stoppage material was found at the bottom of the pipe, it could be inferred that sometime before the accident it had been above the clean-out opening (862a). That inference made, the gist of petitioner's theory was that it could be then further inferred that the stoppage material was present in the galvanized elbow above the clean-out opening; that hydrogen had been liberated at the point, that it was trapped at that point creating pressure on the stoppage material forcing it down to the bottom of the pipe and expelling the clean-out plug. This is the classic example of reaching a conclusion by basing inference upon inference.

In *Leonard* v. *Ashley Welding Mach. & Iron Co.*, 11 App. Div. 2d 1073, aff'd 10 N. Y. 2d 993, there was a fire caused by an explosion in an oil burning furnace. Plaintiff proved that in making repairs to the boiler, defendant's employee had stumbled over its feed line. The next day, the odor of fuel oil pervaded the boiler room and other parts of the premises. There had been no such odor prior to that day. The day after that, there was an explosion. Plaintiff urged, through an expert, that there had been a disturbance of the oil feed line which created a leak in the firebox; that, as a result, oil lay in the firebox until it became heated by the radiant heat of the burning oil from the jet; that as it became heated, it gave off vapors discernible throughout the premises, that when it reached a particular heat and the correct explosive mixture, it exploded. The Appellate Division in reversing plaintiff's judgment and dismissing the complaint wrote:

> "'Although there is proof that defendants came in contact with the fuel line, there is no proof that defendant caused any damage thereto, or that there was an oil leak inside the firebox, or that defendants caused such leak, even if it is presumed that such leakage did occur. The contrary conclusion stated by the expert witness, called by plaintiffs, was based upon an as-

sumption of facts, which were inadequate to sustain the inferences upon which the conclusion rested. Such conclusion could have been reached only by basing inference upon inference. Whenever facts are sought to be proven by circumstantial evidence, every inference must stand on some clear direct evidence, and not on some other inference or presumption. (Lamb v. Union Railway Co., 195 N. Y. 260, 266; Ruppert v. Brooklyn Heights RR. Co., 154 N. Y. 90)."

The above is precisely the posture of Dr. Willard's opinion.

The only proved *fact* was the presence of zinc of unknown origin in the stoppage material found at the bottom of the pipe below the clean-out opening. The various opinions expressed by Dr. Willard, all premises of her finding a small quantity of zinc in stoppage material at the bottom of the pipe, constituted a series of intermediate conjectures leading to the ultimate desired conjecture.

"Words put in the form of an opinion uttered by a witness, even though he be an expert cannot create an issue of fact when the factual basis for the opinion does not sustain his conclusion."

Strasberg v. *Equitable Life Assurance Society*, 281 App. Div. 9, 13.

There was insufficient factual data for Dr. Willard's opinion.

An expert's willingness to give an opinion on the basis of patently inadequate and insufficient data, does not mean that he should be allowed to do so on the theory that the insufficiency of the data merely affects the weight to be given to his opinion. Willingness to render an expert opinion is no substitute for the facts needed as a foundation for a scientific opinion. It outrages all concepts of the

judicial process to say that a question of fact can be made by an expert's opinion, merely because the expert is amenable to giving one notwithstanding the lack of information necessary for a valid opinion.

Dr. Willard did not, by far, have adequate data to render her opinions.

It should be noted that Dr. Willard, testifying about phenomena dealing with drain pipes and drain cleaning materials, had never made any study of drain cleaning preparations in general (789a). She had never made any analysis of drain cleaners for manufacturers or distributors (789a-790a). She had never had any commercial connection with drain cleaning preparations (790a). Perhaps her inexperience is the reason why she felt no inhibitions about rendering opinions despite enormous gaps in information.

She was not told how much "Mule-Kick" had been used (739a).

She was not told how much water had been used (739a).

She assumed that the accident occurred between an hour or hour and a half after the second solution of "Mule-Kick" was poured into the sink (741a). The fact of the matter was that the accident occurred the day after the pouring of the second solution.

She was not told about any ice blockage, only that there were ice flakes (750a).

She was not told about the size or location of the ice inside the pipe (757a, 760a), but "assumed," nevertheless that it was not sufficiently large to cause blockage (771a).

She did not know that the torch plaintiff used to thaw the ice in the pipe generated heat of 3800° Fahrenheit (751a).

She could have measured the amount of hydrogen that was liberated but had made no such measurements (795a).

The amount of hydrogen emitted can be calculated from the quantity of zinc that is present (795a-796a). She did not know the weight of the stoppage material which contained the zinc she was urging as the source of the exploding hydrogen (796a). She could not say how much hydrogen had been liberated by the 1.2% zinc in the stoppage (794a).

She did not know how long the zinc had been in the pipe (791a, 839a-840a). She could not state its source (796a, 807a).

The prevailing temperatures ranged from below 0 to 20° during the three days in issue. Dr. Willard was not told anything about those temperatures although she had inquired about them because of their possible effect on the production of hydrogen (828a). When it is cold, zinc will not react to produce hydrogen (847a, 958a).

She did not test any galvanized pipe with caustic solutions to see what the reactions would be (830a).

She knew nothing of the prior use of pipe cleaning preparations (841a). There was testimony that the tenants had, a few days earlier, inserted drain cleaning preparations into the pipe. She had not been told of that (779a-780a).

She said that the hydrogen did not escape upwards because of the presence of the column of water above it (839a). She conceded that the column's capacity to prevent escape of gas depended upon its weight (833a). She did not know what that was but "assumed" a length of column sufficient to hold back the hydrogen (833a-834a).

We submit that such tremendous lacunae in information are fatal to the probative value of her opinion, they make her opinion sheer conjecture.

An expert's willingness to assume whatever is needed for the purpose of rendering opinion despite absence of vital facts, his readiness to say the magic word that is required to establish a *prima facie* case does not constitute proof.

We believe that the analysis of Dr. Willard's testimony makes applicable the oft-repeated rule:

> "When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury and the facts sought to be proved is established."

Matter of Case, 213 N. Y. 199, 204.

POINT IV

The physical facts demonstrate that there was no accident caused by hydrogen as claimed.

If hydrogen formed as claimed by petitioner, it would begin forming the moment that there was contact between the sodium hydroxide and the zinc., and would continue to form during all the time of such contact (835a-836a). Were plaintiff's theory correct, hydrogen would have begun forming on January 25th, and continued to form until the accident occurred on January 27th.

Admittedly, hydrogen is fourteen times lighter than air and its natural tendency would be to rise and escape (831a, 836a). If forming in liquid, the hydrogen would visibly bubble up, particularly if heat were applied. Dr. Willard testified at page 841a:

> "Q. Assuming that hydrogen gas is there, was there, whenever the high caustic or high amount of caustic was put in there, assuming that hydrogen was there the 25th, 26th and 27th, when the torch was applied,

wouldn't that heat tend to send the gas up? A. Yes, it might.

"Q. Especially if you had heat of 3500° Fahrenheit, that would send the gas up, wouldn't it and disappear? A. But you would see it bubbling.

"Q. You would see it bubbling through? A. Yes."

It was admitted that no such bubbling phenomenon was ever observed. The pipe on the second floor was open, plaintiff looked into it shortly before the accident, the mixture was visible to him (347a). It did not spray up out of the pipe (347a), it showed no signs of pressure or of gas of any kind (348a), there was no propulsion upward of any fluid (349a).

It is simply inconceivable that if hydrogen were forming at the elbow since January 25th, there would, during the two and a half days of its continuous liberation, be no evidence whatever of its bubbling up and out.

Here then was a conceded, physically observed phenomenon, conclusively demonstrating that no gas was forming or escaping and completely negating the theory of the presence and formation of gas. When opinion explanations are contradicted by the physical facts, the facts must prevail. (*Strasberg* v. *Equitable Life Assurance Society,* 281 App. Div. 9, 13; *Higgins* v. *Mason,* 226 App. Div. 426, 429; *Kinney v. State,* 191 Misc. 128, 134.)

There was no evidence of the consequences that one would normally expect to follow an "explosion" of hydrogen in a pipe, such as a busting or splitting of the pipe, a tremendous noise, a flash of some sort, a fire of some kind. There was no proof that when the "explosion" occurred there was any splattering of liquid on the second floor, where the pipe was open permitting ready escape of anything in it, were there an explosive force acting inside the pipe. Altogether it is clear that there was no explosion of hydrogen.

The occurrence, however, was not a mystery shrouded happening, it was readily explainable.

As indicated earlier, before any suit was contemplated, petitioner had stated that he had determined the cause of the blockage to be ice in the pipe above the clean-out opening. He had used a Presto-lite torch to melt or thaw out this ice after having hand-tightened the plug that covered the clean-out opening. Dr. Snell, testifying for the defendant, explained what happened. When the ice blockage finally thawed or melted, there was nothing to hold back the column of water above it, it fell by force of gravity creating a sufficient pressure to force out the hand-tightened plug and cause the solution to spray out of the opening (988a-989a).

Dr. Snell had recreated the conditions in the pipe—the column of water, the clean-out opening, the stoppage; when the obstruction to the column was removed the water fell and sprayed as the solution did in the accident (989a-996a).

Dr. Willard admitted that if there were ice in the pipe obstructing the column of water above, the column would exert pressure on the blocking ice (762a-764a). She admitted that the column tended to force the obstruction down (764a). She admitted that if the "Mule-Kick" mixture had been standing in the pipe, it would be restrained by the ice blockage from flowing away (763a). She admitted that if the ice blockage were removed, there would be a free fall of the column of water with the "Mule-Kick" in it (764a). She conceded that application of the Presto-lite torch would tend to melt and thaw the ice blockage (759a-760a). She conceded that the thawing of the ice, plus the pressure exerted by plaintiff in manipulating the snake on the second floor, might have contributed to the fall of the column of the mixture in the pipe (774a).

Since it is at least as likely that that happened as what petitioner claimed happened (we submit that the free fall is the true explanation for what occurred), respondent may

not, under Pennsylvania law, be held liable. (*Hopkins* v. *E. I. DuPont de Nemours & Co.*, 212 F. 2d 623, quoted, *infra*, at pp. 3-4.)

Reasons for Denying the Writ

We have demonstrated that the issues here are all factual, properly decided in accordance with applicable state law.

The petition, therefore, lacks substantial ground because it turns upon the particular facts involved.

Sufficiency of evidence does not ordinarily induce granting of a writ. (*N. Y. Cent. R. R.* v. *Kinney*, 260 U. S. 340, 346 [1922].) "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178 [1938].) "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *" (*Huddleston* v. *Dwyer*, 322 U. S. 232, 237 [1944]).

CONCLUSION

There are no exceptional circumstances in this case warranting review by this Court. The petition should be denied.

Respectfully submitted,

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BENJAMIN H. SIFF,
Of Counsel.

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PETITIONER'S REPLY BRIEF TO DIAMOND ALKALI CO., RESPONDENT.

Sexauer has filed a brief in this case opposing the Petition for Certiorari. It appearing that Diamond Alkali was not going to file a brief, petitioner filed a reply brief to Sexauer and pointed out the basic palpable errors in its reasoning and contentions. Thereafter Diamond Alkali did file a brief in opposition to the Petition for Certiorari as to it. It too reveals the same basic errors that prevail in the Sexauer reply and highlights the fundamental weakness of the majority opinion below. Diamond's reply cites no Pennsylvania cases to support it and obviously relies on New York law which is of course under our view inapplicable. It thus crashes head-on into the controlling rule expressed in *Erie v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938).

In its brief Diamond Alkali of necessity has been relegated to utter reliance upon the majority opinion of the Court of Appeals below. At pages 4-5 of that brief this is clearly demonstrated. It quotes from that opinion as follows:

> *"However, as in the case of the Sexauer label, since the cause of the accident is unknown, what could Diamond have suggested be added to the label even assuming such a policing power?"*

We have already pointed out in our Petition for a Writ of Certiorari that the plaintiff did prove the cause of the accident (pp. 26-27). As there indicated, Dr. Willard emphatically stated the cause. Judge Friendly in his opinion believed that plaintiff had proved the cause. Indeed, he stated that even without Dr. Willard's testimony (Appendix 19a, 20a) the jury had an adequate factual basis from which to find negligence. Judge Friendly added (20, 21a):

> "However, the proof went considerably beyond this. Dr. Mary Willard, Professor Emeritus of Chemistry at Pennsylvania State University, *testified that in her*

> *opinion the accident was caused by the production of hydrogen from the combination of zinc with the heated solution of sodium hydroxide.* She thought that the production of hydrogen above the stoppage forced the stoppage down through the pipe past the clean-out hole and that this pressure expelled the plug and the caustic solution through the hole. Another theory, consistent with a statement by Stief in applying for workmen's compensation benefits although in conflict with his trial testimony, is that there were two stoppages, one of ice above the plug and another of grease and debris below; that the melting of the ice by the torch caused some of the Mule Kick solution to fall through the pipe past the clean-out hole where it was stopped by the second blockage; and that the reaction of the Mule Kick with zinc in the pipe at the high temperature created by the torch produced hydrogen, which expelled the plug and caused the mixture to spurt through the hole." . . .
>
> " 'If twelve practical people can be persuaded that Stief's theory of the accident was more plausible than Sexauer's, I fail to understand how a judge could say they had gone beyond the bounds of reason." . . .
>
> " 'Depriving Stief of jury determination of the common sense questions on which his case against Sexauer depends runs wholly counter to the trend of Supreme Court decisions over the past decades.' ".

As the dissenting opinion makes clear the plaintiff has provided a factual explanation of how the accident happened and that those facts showed Diamond to be negligent. In that state of the record it was strictly the jury's province to decide how the accident happened and whether it constituted negligence, and the Court had no power to usurp that function. *Lavender v. Kurn,* 327 U. S. 645 (1946); *Smith v. Bell Tel. Co.,* 397 Pa. 134, 153 A. 2d 477 (1959).

Recognizing that this Court will in all probability vigorously enforce the landmark rule established by *Erie*

v. Tompkins, supra, Diamond Alkali also argues as an extra string to its bow that the evidence in the case reveals a lacuna of proof that it was aware of what Sexauer's label did or did not say and that this, therefore, somehow insulates it from liability. We think that this is an irrelevant consideration under Pennsylvania law. We do not agree that Diamond did not know what was in the label. The record is crystal clear that Diamond was fully aware of the inadequacies and misrepresentations of Sexauer's label.

Despite the hedging statement by one hostile witness that Diamond Alkali only began to sell caustic soda to Sexauer around 1961, the fact is that when pressed for a specific answer, Diamond flatly admitted in discovery procedures that it had had in its possession cans of Mule Kick as early as 1958 and, therefore, of course had the opportunity to and did see the labels on the cans prior to the date of the accident in this case. The following interrogatories were asked and answered by the defendant Diamond Alkali at 598a:

> "15. During the years 1959 and 1960, did you have the occasion to see any can or cans of Mule Kick Waste Pipe Cleaner?
>
> A. One—early 1959 or in 1958.
>
> 16. If so, state the time and place where these cans were seen and the circumstances under which they were seen.
>
> A. Received one can along with a complaint, asking if we could furnish a smaller sized material, so can could contain proper weight."

It is shocking that the defendant, Diamond, would contend that it had no knowledge of the contents of Sexauer's label for Mr. Sexauer testified as follows (680a):

> "Q. Do you know whether the information in that label has been checked during the period that you have been with the company?

A. Yes.
Q. Who checked it?
A. A chemist.
Q. Who?
A. Foster Snell.
Q. When?
A. I can't give you the date on that. And then the chemists that we buy the material from tested it.
Q. You mean Diamond Alkali?

MR. CARROLL: Now, unless he knows I move to strike the answer out.

MR. LORD: He said he knew.

Q. *Do you know that these people have checked it?*
A. *Yes, sir.*
Q. *And Diamond Alkali are one of those people?*
A. *In recent years, yes."*

Moreover, there is an admission by Mr. Carroll, counsel for Diamond that the label has been the same that has been used for thirty years, so that it must have been on the cans in 1958 when admittedly it was seen by the Diamond people (678a).

Even if Diamond had not seen the label, this would under Pennsylvania law, be no defense. It was its duty to see the label and to make certain that those to whom it had forwarded this dangerous material were labeling it properly so that adequate warning with necessary particularity would be given and be available to the ultimate consumer.

In our brief in chief, page 7, we cited *Roth v. Bankers Securities Corp.*, 242 F. 2d 509, 510 (C. A. 3, 1957) a Pennsylvania case: There Roth, a pedestrian leaned against a special type structural glass window which collapsed. Held: the owner should have realized that pedestrians might lean against the window and he was therefore under a duty to affirmatively ascertain the tensile strength of the glass in advance. He would thereby have realized it

was not fit for that purpose. The Court so held even though there was no proof of similar accidents having happened and despite the fact that the glass had been installed by an independent contractor. The court ruled that the owner was not insulated from liability by the fact that he had used an independent contractor to install the glass. It was his personal non-delegable duty to learn and know whether that kind of glass was fit for the use to which it was to be put on his property. So too, here Diamond is not protected by the fact that it passed on its caustic soda to Sexauer. Diamond was under a duty to find out for itself exactly how Sexauer was labeling the material after it received possession of it and to make certain that such labels gave the adequate warnings.

As we have said repeatedly, and here reiterate at the possible expense of boredom, we are dealing with Pennsylvania law. Pennsylvania imposes the above described affirmative, stringent non-delegable responsibility upon Diamond under the facts of this case. That New York law may hold to the contrary is utterly irrelevant. This Court has said and mandated that the Courts below were compelled to follow Pennsylvania law in cases such as this. This the Federal Courts in New York did not do. That is why this case comes to this Court to correct a clear violation of constitutional requirements. Those are the issues which must be decided and the errors can be corrected only in this Court. We respectfully submit that is why certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 455.

CLAYTON H. STIEF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.

and

DIAMOND ALKALI COMPANY,

Respondents.

REPLY TO BRIEF OF RESPONDENT, SEXAUER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 455.

CLAYTON H. STIEF,

Petitioner,

v.

J. A. SEXAUER MANUFACTURING CO., INC.

and

DIAMOND ALKALI COMPANY,

Respondents.

REPLY TO BRIEF OF RESPONDENT, SEXAUER.

I. Respondent's Brief Relies Entirely Upon Pennsylvania Cases Specifically Disapproved in Later Cases in the Supreme Court of Pennsylvania.

Right at the outset respondent's own brief demonstrates how legally fallacious its reasoning is and how much in error the Courts below were which followed it. Barraged by the contention in petitioner's brief in chief that he has been deprived of the right to trial by jury through the avenue of refusing or failing to apply Pennsylvania law in this case as required under *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938) respondent falls back upon an argument it never heretofore made and asserts that the Courts below did in fact follow Pennsylvania law. To establish this it searched for Pennsylvania cases to support the theory of the Courts below in directing verdicts for the respondents. In the statement of the Question Presented it relies primarily upon a principle of law which

is no longer the law of Pennsylvania. It quotes from *Hopkins v. E. I. Dupont de Nemours & Co.*, 212 F. 2d 623, 625 (3rd Cir.) decided in 1954 which states:

> "... where plaintiff's evidence supports an inference that excludes the liability of the defendant just as strongly as an inference that comprehends liability, a jury would have to engage in speculation and conjecture in order to attribute the accident to one rather than the other."

Indeed more expressly its brief then goes on to cite *Ruppert et al. v. Brooklyn Heights R. R. Co.*, 154 N. Y. 90 in which at p. 93 the Court said:

> "It is entirely true that a material fact in a civil or criminal action may be established by circumstantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established *and to exclude any other hypothesis fairly and reasonably.*" (Emphasis supplied.)

This is simply no longer the law of Pennsylvania. In 1959 the Supreme Court of Pennsylvania decided *Smith v. Bell Telephone Co. of Pa.*, 397 Pa. 134, 153 A. 2d 477 (1959). The United States Court of Appeals for the Third Circuit has faithfully followed *Smith v. Bell, supra* in *Yeager v. J. R. Christ Co.*, 364 F. 2d 96, 101 (1966). In *Smith, supra,* Mr. Justice McBride specifically disapproved that statement and rule which respondent quotes and necessarily must rely on from *Hopkins, supra.* After quoting from earlier cases the Pennsylvania Supreme Court in *Smith, supra* said at p. 137:

> "The formula that 'the circumstances must be so strong as to preclude the possibility of injury in any other way and provide as the only reasonable inference the conclusion plaintiff advances' is not a correct statement of the rule to be applied by the judge on deciding a motion for either a nonsuit or binding instructions. If that were the rule what would be the province of

the jury? In no case where there was more than one reasonable inference would the jury be permitted to decide. Insofar as this rule is stated in our cases it is disapproved."

The Court then in footnote 1, p. 137 specifically cited some 17 cases which had quoted and relied on the erroneous rule that a plaintiff must exclude all possibility of injury which might exculpate the defendant. Those cases relied for authority on five cases cited in respondent's brief here in support of the action of the lower courts here in directing verdicts for the defendants. Now those cases have been specifically disapproved by the Court in its opinion in *Smith, supra.* Those cases are: (1) *Ault v. Penna. R. R.,* 381 Pa. 496 (1955) which cites *Anderson v. Reading,* 306 Pa. 246; (2) *Ebersole v. Beistline,* 368 Pa. 12 (1961) which cites *Houston v. Republican Athletic Assoc.,* 343 Pa. 218; (3) *Foley v. The Pittsburg-Des Moines Co.,* 363 Pa. 1 (1949) cites *Sandt v. North Wales,* 214 Pa. 215 p. 24 [and] *Houston v. Republican Athletic Assoc.,* 343 Pa. 218 [and] *Fix v. Penna. Power & Light,* 346 Pa. 598; (4) *Donaldson v. Pittsburgh Railway Co.,* 358 Pa. 33 (1947) which cites *Houston v. Republican Athletic Assoc.,* 343 Pa. 218 p. 37; and (5) *Davis v. Moylan,* 354 Pa. 508 (1946) which cites *Gausman v. Pearson,* 248 Pa. 348.

So as to leave no doubt about what the rule now is in Pennsylvania the Court then described in clear language the relationship between the court and the jury. It made this statement in the terms of the "power" of the court and said:

". . . *it is beyond the power of the court* to say whether two or more reasonable inferences are 'equal'. True enough the trial judge has to do something like this in deciding a motion for a new trial based on the weight of the evidence but no such rule governs him in deciding whether a case is submissible to a jury." (Emphasis supplied) p. 138.

The Court then turned to the cases involving circumstantial evidence and cautioned the lower courts as follows at p. 139:

> "The right of a litigant to have the jury pass upon the facts is not to be foreclosed just because the judge believes that a reasonable man might properly find either way. A substantial part of the right to trial by jury is taken away when judges withdraw close cases from the jury." *

The Pennsylvania Supreme Court revealed the source of its new rule that compels submission to the jury of questions of negligence and causation when in the posture where the evidence supports both liability or non-liability dependent on the choice of the fact-finder. It relied on and adopted *Lavender v. Kurn*, 327 U. S. 645 (1946) when it decided *Antonelli v. Tumolo*, 390 Pa. 68, 132 A. 2d 285 (1957).

Actually the Pennsylvania court in *Smith, supra* approached the problem in the same manner as did Judge Friendly in his dissent in this case. The Pennsylvania court said at p. 138:

> "Clearly this does not mean that the jury may not draw inferences based upon all the evidence and the jurors' own knowledge and experiences, [in essence 'common sense'] for that is, of course, the very heart of the jury's function. It means only that the evidence presented must be such that by reasoning from it, without resort to prejudice or guess, a jury can reach the conclusion sought by plaintiff, and not that that conclusion must be the *only* one which logically can be reached." (Emphasis supplied.)

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* Indeed Judge Maris in *Wigder v. Errickson*, 339 F. 2d 32, 34 (3 Cir., 1964), noted that under the Pennsylvania rule "a measure of speculation and conjecture would have been required on the part of the jury is immaterial since, as we have seen, there was evidence from which a conclusion of negligence might have been drawn."

Judge Friendly said: (Appendix 19a):

> "Since the only alternative explanation offered by Sexauer, of a free fall of liquid caused by the melting of the ice, failed to account for the wide spread of the liquid through the pantry, the jury would have been justified in accepting plaintiff's theory. As Judge Medina has recently said, 'But there are cases where *common sense* is more reliable than any amount of expert witnesses, and this is one of those cases.'' Achilles v. New England Tree Expert Co., 369 F. 2d 72, 73 (2 Cir. 1966). (Emphasis supplied.)

Respondent's brief and its reliance on the quote from *Hopkins, supra* lays bare the approach of the majority in the Court of Appeals in sustaining directed verdicts for both defendants on the whole record. In essence the majority held that plaintiff had to exclude every cause for which defendant would not be liable. In so doing the Court did and respondent now seeks to deprive the plaintiff of his right to trial by jury as guaranteed by the VII Amendment and ignores the command of *Erie Railroad Co. v. Tomkins, supra,* that required the Federal Court in New York to follow the Pennsylvania rule.[1]

Actually the conclusion of respondent's brief lets the cat out of the bag. Believing that the statement from *Hopkins, supra* is the present law of Pennsylvania, respondent states at pp. 28, 29:

> "*Since it is at least as likely as that that happened as what petitioner claimed happened* (we submit that the free fall is the true explanation for what occurred), *respondent may not, under Pennsylvania law, be liable* (Hopkins v. E. I. Dupont de Nemour & Co., 212 F. 2d 623 . . ." (Emphasis supplied.)

---

1. Whatever the law of New York might be is irrelevant. It was a disregard of this Court's mandate to apply it. Respondent cites no fewer than 13 New York cases in support of this decision. They simply cannot be given any consideration except to illustrate what the majority obviously did. See its citation of *Ruppert v. Brooklyn Heights R. R. Co., supra,* which follows that rule.

Even factually assuming that a free fall of ice as contended by Respondent is a possible explanation of the accident, *Smith supra* teaches that under such circumstances it is "beyond the power of the court to say whether two or more reasonable inferences are 'equal' and . . . "no such rule governs him [the Court] in deciding whether a case is submissible to a jury." The holding of the Court of Appeals in this case just simply ignores the vast progeny of *Erie v. Tompkins, supra,* and through it *Smith v. Bell Telephone Co., supra,* and their teaching.

II. Does Huddleston v. Dwyer, 322 U. S. 232, 237 (1944) Apply Here?

The respondent seeks to foreclose a review by this Court of the acts of the Court of Appeals for the Second Circuit by its reliance on *Huddleston v. Dwyer, supra,* p. 29 of its brief in this Court. The case is inapposite. That case merely holds that "the considered determination of questions of state law by intermediate Federal Appellate Courts are ordinarily accepted by this court". But this is not such a case. Here the Court of Appeals for the Second Circuit was not asserting the state law of one of the state courts within its circuit with which it would have the familiarity that justifies this rule. Here the Federal Court of Appeals in New York was interpreting Pennsylvania law with which it has but little experience and its power over it is certainly in no way binding on this Court. Accordingly, *Huddleston v. Dwyer, supra* is meaningless against the physical background of this case.

III. The Evidence Adequately Supplied All the Necessary Facts Required for Submission to the Jury.

Respondent keeps reiterating that it did not know that its product "Mule Kick" would in combination with galvanized pipe (zinc) produce hydrogen which could explode and at great length splatter this solution, as a result of which it literally burned out petitioner's eyes. To the

contrary, Mr. Springhorn, the assistant to the President of Sexauer conceded his knowledge of this fact. Putting this to one side the simple answer is that under Pennsylvania law which under *Erie v. Tompkins, supra* the Court of Appeals was required to follow, the distributor of a product *must* affirmatively learn and know what its product will do and the extent of its potential for harm. In *Pope v. Reading,* 304 Pa. 326, 156 A. 106 (1931) the Pennsylvania court said just that when at p. 333 the Court said:

> ". . . at common law it was held that every man must have some knowledge 'of the quality of his beast' 1 Hale P. C. 430 and use appropriate means to keep that beast from harming people . . ."

Although that case was brought to the attention of the Court of Appeals, that Court ignored *Pope, supra.* It did not cite or discuss it. And neither does respondent. Another panel of the Court of Appeals for the Second Circuit did in another case however hold a plaintiff entitled to a presumption that a similarly situated defendant was aware of the possibility of injury from the use of its product in construing Massachusetts law. In *Wright v. Carter Products,* 244 F. 2d 53, 59 (C. A. 2 1957) the Court said at p. 59:

> "Although not considered below, or raised upon appeal, we would point out that the plaintiffs may be entitled to the benefit of a presumption that the defendant was aware of the possibility of injury from the use of its product. 'In Massachusetts the rule seems to be that every manufacturer is presumed to know the nature and qualities of his products * * *'".

And as we have just noted this is undoubtedly the rule of Pennsylvania, *Pope, supra.* See also *Roth v. Bankers Securities Corp.,* 242 F. 2d 509, 510 C. A. 3.* By ignoring

* In Roth, a pedestrian leaned against a special type glass structural window which collapsed. Held: the owner should have realized that pedestrians might lean against the window and was therefore under a duty to affirmatively ascertain the tensile strength of the glass

those cases and their holding the courts below have deprived plaintiff of his right to trial by jury and conflicts with *Erie, R. R. v. Tompkins, supra.*

Wright v. Carter, supra is of additional great interest because it so devastatingly disposes of the argument on p. 10 of respondent's brief that:

> "The proof was that in the 5 years prior to 1960, 3,800,000 cans of 'Mule-Kick' have been manufactured and used (1038a). There is no suggestion that during those years there had been so much as one complaint of any such incident as here allegedly occurred.
> Why, in all reason, should a warning be given of the hazards of an explosion or dangerous pressures caused by the liberation of hydrogen induced by the reaction of sodium hydroxide with zinc elements fortuitously present in material clogging a drain when, in all the years of practical experience no such incident was ever heard of?"

Said the Court in *Wright v. Carter Products,* 244 F. 2d 53 (1957) at p. 56:

> "Evidence was also introduced tending to establish that prior to June 1951 the defendant was aware of this peculiar property of its product, for in the four years from 1948 to 1951, the defendant, according to its own files, had received 373 complaints of skin irritation allegedly caused by Arrid. *During this same period, however, the defendant had sold over 82,000,000 jars.* The plaintiffs also attempted unsuccessfully to introduce findings of the Federal Trade Commission, affirmed by a court of appeals prior to Mrs. Wright's purchase in 1951, to the effect that the use of Arrid will cause dermatitis in some people.

---

in advance and would thereby have realized it was not fit for that purpose and this was so held even though there was no proof of similar accidents having happened and the glass was installed by an independent contractor.

> No evidence was adduced at the trial to show that the defendant was negligent in the preparation of the particular batch of Arrid that precipitated Mrs. Wright's condition. Thus the trial court concluded that the only issue of negligence presented was whether the mere use of aluminum sulfate in Arrid was sufficient to charge the manufacturer with liability to these plaintiffs when no warning was given by it of the possible harmful effect that Arrid might have to a very small proportion of the potential users of that deodorant.
>
> Relying on the statistical infrequency of injury caused by the use of Arrid, the trial court held that the defendant was not negligent, and that 'the injury suffered by the plaintiff was the result of her own allergy rather than being caused by any inherent defect in the product itself.' The court below apparently believed, since the evidence before it indicated that only a minuscule percentage of potential customers could be endangered by using Arrid, that the defendant was under no duty to warn of any harmful propensities the product might have despite the defendant's own knowledge thereof. *With such a conclusion we cannot agree, for we believe that duties to warn are not, in all cases, measured by solely quantitative standards. We believe that the trial court erred in defining the scope of this defendant-manufacturer's liability, and we remand the case for further findings in the light of our discussion herein.*'' (Emphasis supplied.)

Respondent's brief and the evidence itself convicts it of knowledge of the danger of splattering which this product did do here. At pp. 18 and 19 respondent argues that the label did warn against splattering. But this was only about the hazard present while *mixing* the powder in water. It did *not* warn against potential splattering that could be caused by an explosion which it knew or should have known

would occur should the product contact zinc and produce hydrogen after it was lodged in the galvanized pipe. That was the risk present here. The risk of an explosion is *always* present when this solution is put into galvanized pipe where there is an unclosed opening. The President of Sexauer admitted he knew it could do so for he knew hydrogen was extremely explosive. And yet no warning against this type of explosion and splattering of this extent —some ten feet across the room and eight foot high was given. This was the particular hazard a layman unversed in chemistry would not know. He had put the solution into the pipe the day before. Little did he know when he opened the plug that he was unleashing a blinding fury. So he only finger-tightened the plug. And when the hydrogen gas fell below the opening whether because of the pressure of the water above it or the free fall caused by the Prestolite heating of the pipe, a maelstrom tore loose. That danger, an opening in the cage [pipe] through which the wild beast could blast in its expanding drive to escape is to a chemist a very real probability. And as to that basic, but to the layman unappreciated risk, no warning at all was given. The jury alone had the right and duty to say whether such conduct [omission] was negligence.

Respondent also argues that New York cases support the proposition that there is no liability in the absence of proof of similar mishappening *and* proof that the precise set of facts had previously been reported or recorded and hence is an unforeseeable hazard. There is no affirmative proof that such an accident had not previously occurred. Secondly this is not Pennsylvania law on foreseeability.

> "Foreseeability does not mean that precise hazard or exact consequences that were encountered should have been foreseen". *Parris v. Bruder Co.*, 261 F. 2d 406 E. D. Pa. (1966). This case cites a host of Pennsylvania cases so holding.

Defendant knew that if this mixture in *some* way contacted zinc it would create hydrogen, a highly expanding explosive gas. Certainly it knew that galvanized pipe and fittings have zinc coatings on them which inevitably the solution would contact and mix with as it went down the pipe. All that restrained it from explosion on other occasions was that no openings were exposed as here, after the solution was put in the pipes. On other occasions when open, users may not have as here applied heat which the respondents themselves recommended to users on the label. Petitioner did not know the potential for harm from such a combination of facts. But respondent was obliged to know and warn against this danger. This it did not do. This is Pennsylvania law. It was controlling. Whatever the source of contrary holdings, they were error in the Penna. case. See also *McDougall v. Penna. Power & Light Co.*, 311 Pa. 387, 392, 396-7 (1933). Respondent's brief cites New York cases seemingly opposed. But they are not authority here and should have been ignored. To the contrary they were religously followed and petitioner was denied his right to trial on these factual issues.

IV. Diamond Alkali.

Diamond alkali has not filed a brief replying to petitioner's contention that under Pennsylvania law a jury could have found it negligent. Under the evidence a jury could have found that Diamond was fully aware of the label Sexauer put on its cans of sodium hydroxide it had purchased from Diamond in bulk. It knew that this label did not supply the vital warnings of the explosive potential of this chemical that it, Diamond felt it necessary to put on the drums in which it shipped this product to Sexauer. We have covered in detail in our brief in chief on p. 17, how the failure to do something about this omission by Sexauer puts liability on Diamond under Penna. law which adopts Sec. 388 of the Restatement of Torts 2nd.

Long before Section 388 of the Restatement of Torts was written Pennsylvania had adopted that principle and held that

> **"warning to the intermediate party or his discovery of the danger, did not relieve the original supplier of liability."** *Trusty v. Patterson,* 299 Pa. 469, 149 Atl. 717 (1930).

The Courts below did not apply Penna. law as to this. Therein one finds a violation of the mandate of *Erie R. R. v. Tompkins, supra.* Since it cannot answer this charge, Diamond assumes the ostrich position, buries its head in the sand and makes no reply at all.

Conclusion.

We have urged the following reasons why the petition for certiorari should be granted. The respondents' brief does not and we believe cannot answer them.

1. There remains undecided the question heretofore specifically reserved by this Court in *Byrd v. Blue Ridge Rural Electric Co-operative,* 356 U. S. 525, 538, 539, 78 S. Ct. 893, 901, 902, 2 Law Ed. 2d 953. It appeared on page 539 of that opinion as footnote 10. It questions whether the evaluation of factual proof offered in support of a legal question, there, statutory immunity for torts, here the burden of proof of negligence or causation, is or may under a local rule be a function for the judge exclusively or whether in the protection of the right to trial by jury, it must be submitted to a jury for determination. We respectfully submit that where there is any evidence which factually supports the legal contention under consideration, that the court is not free to decide it on its own, but must leave it as an issue for the jury. This problem respondents very carefully skirted and ignored in the reply brief.

2. Is the rule enunciated in *Lavender v. Kurn,* 327 U. S. 645 (1946) that if there is any evidence to support a contention of a party that that issue must be submitted

to the jury even though there be strong evidence to the contrary one of general application in the Federal Courts in all litigation, or is it limited to FELA and Jones Act cases?

3. That assuming that a matter arises at the trial level in the United States District Courts, solely by reason of diversity of citizenship, and raises questions of local law of negligence, is the Federal District Court obliged nonetheless to apply the federal test of *Lavender v. Kurn, supra,* to determine whether the plaintiff has met his burden of proving negligence regardless of the rule that obtains in the non-federal courts of the state of occurrence?

4. Should this Court answer #3 in the negative, in a case lodged in the United States District Court for the Southern District of New York that came there purely by reason of diversity of citizenship and occurred in Pennsylvania, is the District Court in New York by the mandate of *Erie R. R. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938), required under these circumstances to apply Pennsylvania evidence law and not New York state court evidence rules to assure the same result as would follow if the case were tried in Pennsylvania? *Guarantee Trust Co. of New York v. York,* 362 U. S. 99, 65 S. Ct. 1464.

This case cries out for the grant of certiorari. This blind man was "unwarrantably deprive[d] . . . of his right to a jury trial". But even more important is the fact that a basic question of procedural law, national in scope is here involved. What is the test of when a prima facie case is established in Federal Courts today? Must a litigant eliminate every other possible inference even though there is evidence to support liability before his case can be submitted to the jury? *Lavender v. Kurn,* 327 U. S. 645 (1946) says a litigant need not go so far. The Court below says he must do so. It apparently thought that rule applies only to Federal Employers' Liability Act (45 U. S. 51 et seq.) cases. We believe it is a rule that must be applied

in all types of cases in the Federal courts even when the case arises in a state where the more restrictive rule is normally followed. But at any rate since this case arose in Pennsylvania, certainly the Federal Court in New York had no right to impose the New York state court rule of burden of proof on this petitioner instead of the rule of the locus of the occurrence in Pennsylvania.

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 455

CLAYTON H. STIEF,

Petitioner,

J. A. SEXAUER MANUFACTURING CO., INC.

and

DIAMOND ALKALI COMPANY,

Respondents.

BRIEF OF RESPONDENT, DIAMOND ALKALI COMPANY, IN ANSWER TO REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF, MISLEADINGLY, RECITES TESTIMONY WITH RESPECT TO DIAMOND ALKALI COMPANY'S KNOWLEDGE OF THE CONTENTS OF THE LABEL

Page 3 of Petitioner's Reply Brief recites answers to interrogatories which were read into the record at page 598a. These were addressed to witness Carl A. Roth who was employed by Diamond Alkali Company, pages 593a, 594a. This witness, as is set forth at page 3 of Petitioner's Reply Brief saw one can of "Mule-Kick" waste pipe cleaner. This was early in 1959 or in 1958 when "He re-

ceived one can along with a complaint, asking whether we could furnish a smaller size material, so can could contain proper weight."

Petitioner failed to advise this Court that the next interrogatory, page 598a, reads as follows: "Did you read the label and instructions on the can?" "A. Not that I recall as I was only interested in contents", page 599a.

There is nothing in the record to indicate the significance of this testimony with respect to the time at which Sexauer first purchased from Diamond. This could have been an initial inquiry which led to the commencement of a business relationship. In any event, the language is not meaningful in view of the witness' statement that he did not recall reading the label and instructions on the can since he was interested only in the contents.

Dated: New York, New York
September 18, 1967

Respectfully submitted,

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SUPREME COURT, U. S.

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PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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OCTOBER TERM, 1967.

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CLAYTON H. STIEF,

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FOREWORD.

Petitioner here filed his original Petition for Certiorari to the United States Court of Appeals for the Second Circuit because the Second Circuit affirmed a directed verdict denying the petitioner the right to a jury trial on a record which he respectfully submits unquestionably supports a submissible issue of fact as to negligence and causation which totally and permanently blinded him. He was using a drain pipe cleaning chemical which formed hydrogen when it contacted the inner galvanized coating of the pipes into which he had placed the chemical powder. It ex-

panded and exploded, blasting out a loosely tightened nut in the pipe and splattered completely across the room to smother his face in this lethal liquid substance.

Judge Friendly in a markedly angry dissent noted that your petitioner was deprived of his right to trial by jury under the 7th Amendment of the Federal Constitution by the actions of the trial judge and the majority below. This untoward result was caused solely because the wrong legal test as to the sufficiency of the evidence to be followed in federal courts was used. And this confusion resulted from the failure of this court to decide this question which it itself in *Dick v. New York Life Insurance Co.*, 359 U. S. 437, 444-445 conceded in 1959 remains to this day "an unsettled question". That question needs to be decided now. By the refusal of certiorari this court has again delayed doing so.

We at the Bar have repeatedly been taught and we as counsel in this case have told the petitioner that the denial by this court of a petition for certiorari does not mean that the petitioner's contentions are wrong, or that the decision below is right. It may merely mean that the question is either not of sufficient national importance to warrant consumption of this court's time, or that it is not now timely to meet this issue. Counsel have explained to the petitioner that the Court today is deeply concerned and engaged in reviewing and considering the petitions of men who are in prison who claim that they have been convicted at their trials by violations of their constitutional rights under the various sections of the Federal Constitution of the United States, albeit the evidence of their guilt is almost insurmountable. Petitioner respects the high moral motivation in this. But petitioner says that he too is in a prison. He says he is in an economic prison from which he finds it impossible to gain his freedom which he needs so desperately as he is a very young man, married and the father of three small children who look to him for support. He points out that he has not been

guilty of any misconduct or of any act which produced this untoward event and that he is the completely innocent victim of this tragic occurrence. He points out that no one has said that he was guilty of contributory negligence, and that in no opinion is there any such assertion. He wonders then whether his tragic stance in life today is to be considered merely "an act of God" and that he must consider the refusal of this Court to review his case, as "part of his lot in life". How does counsel reply to the searching inquiries by this humble, simple citizen who has been put into this tragic position and asks only that he be given his day in court? Where the decision rests so firmly upon a proposition of law which only this court "can set-[illegible] does counsel explain to this lonely petitioner that he may be right, that the law may really be in support of him, but that the law has neither the time nor the willingness to reach him now? How does counsel explain to this petitioner that while *every* person charged with crime will be given a hearing in this court if there is any evidence of a violation of any constitutional protection given him by law, that he, the petitioner here, will not be considered as an idividual and how the law affects him—that the court will only consider questions of law as such without regard to its effect on the individual involved—that the court concerns itself only with the general determination of the body of law itself? We respectfully submit as counsel that there is a grave constitutional question in this case. That the law does support the petitioner. That the record does under the law entitle him to the submission of his case to the jury. That this issue of law is one which must repeat itself invariably and constantly in every district court in the United States where federal diversity jurisdiction matters are being presented daily and that there is a dire need for the decision of this point here and now. We proceed to the presentation of the legal question involved:

ARGUMENT.

1. In this case after a hung jury the learned Trial Judge in the Southern District of New York granted respondent-defendant's motion for judgment on the whole record on the ground that the petitioner had failed to establish that the defendant Sexauer Manufacturing Co. was negligent in the labelling of its chemical product used as a drain cleaner and/or that such negligence was the proximate cause of the accident. This action of the Trial Judge was affirmed in a two-to-one opinion by Judge Moore-Chief Judge Lombard concurring, with a strong dissent by Judge Friendly who held that both negligence and proximate cause were adequately established.

2. This accident having occurred in Pennsylvania and all of the contacts with the accident having taken place in Pennsylvania, under all rules of Conflicts of Law, Pennsylvania law was controlling. As such, the cases of *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A. 2, 850 (1945) and *Pope v. Reading*, 304 Pa. 326, 156 A. 106 (1931) were the key citations. Under *Maize, supra,* the manufacturer and/or distributor is required to warn of every risk which he knows or ought to know might prove to be a source of danger to prospective users or those in the ambit of its use. No warning was given on this label that the contents of a can of Mule Kick used as instructed by dissolving it in hot water, would if it came in contact with the inner zinc coating of galvanized pipe or zinc particles normally found in debris that clogs drain pipes, would create hydrogen. Nor was any warning given that hydrogen expands when the pipes are thawed by the application of a Prestolite torch as recommended on the label and would explode and splatter out of the nearest possible opening. Under *Pope v. Reading, supra,* the owner or manufacturer or distributor of a product, building, chattel or goods is required to know exactly and warn about the hazards that exist or arise in the normal use of such products. No such warning indicating that this

chemical mixed in hot water would expand when it came in contact with zinc in any form in galvanized pipe and would create hydrogen which would explode and splatter through any opening it might find within the contained area to splash outwardly a great distance in its attempt to escape from confinement. Precisely that happened in this case and it totally and permanently blinded this married man, the father of three small children. Negligence may be omission as well as commission. The failure to warn of a particular hazard at all is as much negligence as is a false representation of safety.

3. The law in the federal courts has generally been held to be that if there is *any* evidence which sustains the contention of the plaintiff (petitioner here), the case must be submitted to the jury even in the presence of evidence to the contrary. *Mull v. Ford Motor Co.*, 368 F. 2d 713, 716, n. 4 (C. A. 2, 1966).

4. Under Pennsylvania law the rule is identical. In *Smith v. Bell Telephone Co. of Pa.*, 397 Pa. 134, 153 A. 2d 477 (1959) the Pennsylvania Supreme Court said at page 137:

> "The formula that 'the circumstances must be so strong as to preclude the possibility of injury in any other way and provide as the only reasonable inference the conclusion plaintiff advances' is not a correct statement of the rule to be applied by the judge on deciding a motion for either a non-suit or binding instructions. If that were the rule what would be the province of the jury? In no case where there was more than one reasonable inference would the jury be permitted to decide. *Insofar as this rule is stated in our cases it is disapproved.*" (Italics supplied.)

and at page 138 the Court said:

> ". . . Clearly this does not mean that the jury may not draw inferences based upon all the evidence and

the jurors' own knowledge and experiences, [in essence 'common sense'] for that is, of course, the very heart of the jury's function. It means only that the evidence presented must be such that by reasoning from it, without resort to prejudice or guess, a jury can reach the conclusion sought by plaintiff, and not that that conclusion must be the *only* one which logically can be reached." (Emphasis supplied.)

5. According to respondent's own brief the rule that prevails in the United States Courts is not the rule of New York State Courts or the Supreme Court of Pennsylvania. It relies upon the old Pennsylvania case of *Hopkins v. E. I. Dupont de Nemours & Co.*, 212 F. 2d 623, 625 (C. A. 3, 1954) where the Pennsylvania rule was said to be at page 625:

> ". . . where plaintiff's evidence supports an inference that excludes the liability of the defendant just as strongly as an inference that comprehends liability, a jury would have to engage in speculation and conjecture in order to attribute the accident to one rather than the other."

That case and its holding have specifically been rejected by the new Pennsylvania cases of *Smith v. Bell Telephone Co., supra,* and *Antonelli v. Tumolo,* 390 Pa. 68, 132 A. 2d 285 (1957) which specifically adopts the federal test adopted in *Lavender v. Kurn,* 327 U. S. 645 (1946). Respondent then cites and relies as it must upon New York cases which hold that the plaintiff has not presented a submissible case requiring jury determination *unless the plaintiff has eliminated every other possible cause of the accident,* even though there be other evidence from which the jury could find the cause of the accident to be the negligence of the defendant. The leading New York case is *Ruppert et al. v. Brooklyn Heights R. R. Co.,* 154 N. Y. 90 where the Court at p. 93 said:

"It is entirely true that a material fact in a civil or criminal action may be established by circumstantial evidence, but the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established *and to exclude any other hypothesis fairly and reasonably.*" (Emphasis supplied.)

What test (to determine the sufficiency of the evidence) is to be applied is directly involved in this case. Is the law of New York to be applied? Is the law of the Federal Courts to be applied? Is the law of Pennsylvania to be applied? Does the Erie doctrine require the Pennsylvania rule to be applied? Or as Judge Lumbard suggested in *Mull v. Ford Motor Co., supra,* is the Erie doctrine "subservient to the kind of jury trial in federal courts that is preserved by the Seventh Amendment . . . and that the federal standard should be applied where the issue is the sufficiency of the evidence required to take the case from the jury"?

If Judge Lumbard's quote in *Mull, supra* is correct as to the proper test, then an explanation must be made as to his departure from that rule in this case when he joined with Judge Moore in forming a majority which resulted in action directly contrary to his own enunciation of the proper rule. The decision in the Second Circuit in the instant case is in direct conflict with *Mull, supra.* The only explanation we can give is that Judge Moore paid lip service in his opinion to that rule when he stated the ground rules for his decision and said:

"First, the question for the trial court was: were there any facts, or facts from which inferences might be drawn, which should have been sent to the jury for its determination as to whether Sexauer had breached a duty to plaintiff. It was not for the trial court so to decide unless there was a failure by plaintiff to present any facts which met legal standards.",

and then ignored it completely in the substance of his opinion. Apparently Judge Lumbard relied on this general assurance without a recognition of the fact that the stated test was in fact abandoned and indeed rejected. No better exposition of this can be found than the sharp critical analysis of it by Judge Friendly in his dissenting opinion and our own comments thereon in our prior briefs filed in this Court. No clearer confession of this can be made than the fact that Sexauer's brief in this court does not even try to support the majority holding as being in accord with *Mull, Lavender v. Kurn, Smith v. Bell Telephone Co.*, or *Antonelli v. Tumolo*, all *supra*. Instead it cites *Hopkins v. Dupont, supra*, and *Ruppert v. Brooklyn Heights R. R., supra*, to establish that petitioner's burden to make out a submissible case requires exclusion of every other hypothesis.

6. This court has in *Dick v. New York Life Insurance Co.*, 359 U. S. 437, 444-445 noted that it was holding in abeyance and that there would remain unsettled the question of whether it is proper to apply a state or federal test of the sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. The very recent decision in the 8th Circuit in *O'Hare v. Merck & Co.*, 381 F. 286, 288 (C. A. 8, 1967) reveals the great importance of the issue presented by this case. There that court only a few days ago took occasion to note that this court had not yet settled this proposition of law which is so deeply bound up in any attempt to reach a decision in the instant case. That court said at 288:

> "We again take note of the Supreme Court's observation in Dick v. New York Life Insurance Co., 359 U. S. 437, 444-445, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959) *that the question whether it is proper to apply a state or federal test of the sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship remains unsettled.* See also

Mercer v. Theriot, 377 U. S. 152, 156, 84 S. Ct. 1157, 12 L. Ed. 2d 206 (1964). We have similarly left the question open. See Jiffy Markets, Inc. v. Vogel, 340 F. 2d 495, 498 (8th Cir. 1965); Hanson v. Ford Motor Company, 278 F. 2d 586, 589 (8th Cir. 1960)." (Emphasis supplied.)

We submit that this case is controlled by the federal test as to the sufficiency of the evidence. We contend that if any state rule is to have any influence here, it would be that of Pennsylvania and not that of New York. We emphasize that the federal rule and the Pennsylvania rule are identical but different from the New York state rule which in substance the majority below followed and that this open question must now here be decided.

WHEREFORE it is respectfully submitted that we now raise an issue of grave importance with new authorities and a new clear recognition of this very urgent problem and the need for its resolution at this time. And there is a broad human issue involved in this particular case that calls for a relaxing of any conceptualism in deciding whether certiorari should be granted on this issue *now*.

Respectfully submitted,

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